Teamsters Local Union No. 122, International Brotherhood of Teamsters, AFL–CIO *and* August A. Busch & Co. of Massachusetts, Inc. Cases 1–CB–8563, 1–CB–8597, 1–CB–8727–2, 1–CC–2529, and 1–CC–2541

August 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On January 16, 1998, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a brief in support and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt his recommended Order as modified and set out in full below.

August A. Busch of Massachusetts, Inc. (the Employer) operates a beer storage and distribution facility in Medford, Massachusetts. From this facility, it distributes Anheuser Busch products to package stores, bars, and restaurants, and other retail beer outlets in the Boston area. The Respondent (the Union) represents two units of Busch's employees under separate contracts, a driver unit of approximately 200 drivers, warehousemen and helpers, and a plant clerical unit of approximately 25 employees. Both contracts expired November 13, 1994. The parties commenced bargaining for new contracts in both units on October 13, 1994. From October 13, 1994, until September 11, 1996, the date of the last bargaining session, the parties held 37 bargaining sessions in the driver unit and 12 bargaining sessions in the plant unit. The parties did not reach an agreement in either unit.

Shortly after Busch and the Respondent had commenced negotiations for new contracts, the Respondent commenced a consumer boycott campaign against Busch. In its consumer boycott campaign, the Respondent engaged in a number of different types of activities such as "group shopping trips," "standouts," "publicity events," and "demonstrations."[3] As explained at section 3 below, the Respondent had previously engaged in such a consumer boycott campaign against Burke Distributing, Inc., the Miller Beer distributor in the Boston area.

The Respondent's conduct found unlawful here occurred in three separate but related areas: (1) the Respondent's conduct at a publicity event at the Pour House, a Boston restaurant, on December 8, 1995; (2) the Respondent's conduct at a demonstration at Woody's Liquors in Boston on May 3 and 10, 1996; and (3) the Respondent's conduct during collective-bargaining negotiations with Busch for new collective-bargaining agreements between October 13, 1994, and September 11, 1996.

The judge found that the Respondent violated Section 8(b)(4)(i) and (ii)(B) by its conduct outside the Pour House and that it violated Section 8(b)(1)(A) and 8(b)(4)(i) and (ii)(B) by its conduct inside the Pour House. The judge further found that the Respondent violated Section 8(b)(4)(i) and (ii)(B) by its conduct at Woody's Liquors on May 3 and 10, 1996. Finally, the judge found that the Respondent violated Section 8(b)(3) by its conduct during collective-bargaining negotiations with Busch.[4] We adopt the judge's findings of these vio-

[1] The General Counsel's motion to strike the Respondent's exceptions and that portion of the Respondent's brief which relates to the chart set out on pp. 4–7 of the brief is denied.

[2] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We disavow the judge's statement at sec. II,D,5, par. 6 of his decision, that the Respondent's bargaining strategy here was one "more commonly utilized by employers."

[3] In group shopping trips, the Respondent's members and supporters clogged retail liquor stores that did business with Busch in an effort to disrupt the businesses and deter customers from patronizing the stores. In standouts, the Respondent's members held consumer boycott signs and banners at locations of high visibility such as highway intersections. At publicity events, the Respondent's members demonstrated with consumer boycott signs, banners, and handbills outside establishments, such as bars and restaurants, that served Busch products and, in addition, entered the establishments as customers to explain the reasons for the boycott, to pass out "Budweasel" stickers (a cartoon depicting a weasel in Budweiser clothing inside a circle with a line drawn through it), and to urge consumers to support the boycott at the point of purchase. At demonstrations, the Respondent's members held banners and placards and distributed leaflets and Budweasel stickers at locations where Budweiser was featured prominently, such as sporting venues.

[4] Specifically, the judge found that the Respondent violated Sec. 8(b)(3) by refusing to furnish information requested by Busch during negotiations, by failing to meet with Busch at reasonable times and for reasonable periods of time during negotiations, and by failing and refusing to bargain in good faith with Busch.

Member Walsh agrees that the Respondent violated Sec. 8(b)(3) of the Act by, inter alia, refusing to furnish the Employer with information it requested about the Teamsters Local 122 Health and Welfare Fund, in which the Employer participates on behalf of its unit employees pursuant to its collective-bargaining agreements with the Respondent. Member Walsh does not, however, rely on the judge's finding and accompanying discussion, in sec. II,D,4 of his attached decision, that the Respondent was in de facto control of the Health and Welfare Fund. Rather, he relies on the judge's findings, in the same section, that the Respondent failed to provide the Employer with relevant requested

lations, except that we find, for the reasons set out at section 1 below, that the Respondent did not violate Section 8(b)(4)(i)(B) by its conduct outside the Pour House on December 8, 1995.[5]

As part of his remedy for the 8(b)(4)(i) and (ii)(B) activity, the judge recommended a broad cease-and-desist order. For the reasons set out at section 2 below, we decline to issue a broad cease-and-desist order for these violations. As part of the remedy for the 8(b)(3) violations, the judge ordered that the Respondent pay the General Counsel's and Busch's litigation costs for that portion of the trial in which the surface bargaining allegations were litigated. The judge, however, refused the General Counsel's request to award Busch its negotiation expenses. For the reasons set out at section 3 below, we adopt the judge's finding that litigation costs should be awarded to the General Counsel and Busch. For the reasons set out at section 4 below, we also find that Busch should be awarded its negotiation expenses.

1. The Pour House

As explained above, the Respondent held a publicity event at the Pour House on December 8, 1995. On that evening, Busch was conducting a joint promotion with radio station WZLX-FM at the restaurant. The radio show was to run from 5 to 7 p.m. Chris Paquin, general sales manager for WZLX, arrived at the Pour House shortly after 5 p.m. As he entered the restaurant, the 8 to 10 picketers outside its front door urged him not to enter the premises, asked him why he wanted to go in, and told him to boycott Bud. When Kathleen Nunnery, an account executive at WZLX, entered the Pour House at about 5:30 p.m., she had a similar experience. The 10 to 12 picketers asked why she was going in and told her she did not want to go in. Susan Alexander, the WZLX account executive who had the Busch account, heard a picket shout "Boycott Bud and WZLX" as she left the Pour House later that evening.

Treating Paquin, Nunnery, and Alexander as prospective customers, the judge found that the Respondent violated Section 8(b)(4)(ii)(B) through the picketers' statements that urged a total cessation of business by prospective customers with both the Pour House and WZLX.[6] We adopt the judge's finding of this violation. Then, treating Paquin, Nunnery, and Alexander as employees of WZLX, the judge went on to find that by this same conduct the Respondent violated Section 8(b)(4)(i)(B).[7] For the following reasons, we reverse the judge's finding of this violation.

As explained in *Service Employees Local 254 (Womens & Infants Hospital),* 324 NLRB 743, 743 (1997), "Section 8(b)(4)(i)(B) proscribes inducing or encouraging employees of a secondary employer to strike." Thus, the issue here is whether the picketers' conduct in calling on Paquin, Nunnery, and Alexander to boycott Busch and not to patronize the Pour House "was designed to induce or encourage any neutral employer's employees to refuse to work." Id. The resolution of this issue turns on whether "such statements would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer."[8]

information about the Fund that the Respondent possessed, and that it also failed to make any effort to obtain other relevant requested information about the Fund from other sources.

[5] Member Walsh agrees that the Respondent violated Sec. 8(b)(4)(i) and (ii)(B) of the Act by its conduct at the Pour House. He does not, however, adopt the judge's finding, in the penultimate paragraph of sec. II,B,3 and in sec. II,B,9 of his attached decision, that destruction of the fun atmosphere at the promotional event at the Pour House demonstrates the coercive nature of the Respondent's conduct.

Nor does Member Walsh adopt the judge's finding in sec. II,B,9 that the relatively large number of Respondent members that it sent into the Pour House, and their confronting customers, demonstrate the unlawful intent of the Respondent's conduct.

Finally, Member Walsh does not agree with the judge's statement in sec. II,B,9, citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), that the Respondent had no legal right to engage in solicitation or distribution of literature inside the private property of the Pour House or any other retail establishment. *Lechmere* does not directly deny nonemployee union representatives a right to solicit and distribute literature on an employer's private property. Rather, and more precisely, *Lechmere* establishes that an employer has the right (subject to certain exceptions not relevant here) to exclude or expel nonemployee union representatives from its private property. Id. at 533–534, 538 (employer may validly post his property against non-employee distribution of literature).

In finding that the Respondent's conduct inside the Pour House violated Sec. 8(b)(4)(ii)(B) and 8(b)(1)(A) of the Act, Chairman Hurtgen and Member Truesdale do not rely on the judge's discussion of *Lechmere, Inc. v. NLRB*, supra.

[6] As explained in *Mine Workers (New Beckley Mining),* 304 NLRB 71, 72 fn. 11 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992):

> Sec. 8(b)(4)(ii)(B) of the Act makes it unlawful, for a labor organization or its agents to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where an object thereof is forcing or requiring any person to cease doing business with any other person.

[7] As explained in *Mine Workers (New Beckley Mining),* supra, 304 NLRB at 73 fn. 16:

> Sec. 8(b)(4)(i)(B) of the Act makes it unlawful, among other things, for a labor organization or its agents to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is forcing or requiring any person to cease doing business with any other person.

[8] In *Los Angeles Building & Construction Trades Council*, 215 NLRB 288, 290 (1974) (emphasis added), the Board observed that:

As a preliminary matter, there is no evidence that the picketers knew that Paquin, Nunnery, and Alexander were employees of WZLX, a secondary employer. Thus, their calls to these WZLX employees to boycott Busch and WZLX and not to patronize the Pour House were addressed to Paquin, Nunnery, and Alexander as potential customers of the Pour House. Indeed, since the calls were to boycott Busch and WZLX, Paquin, Nunnery, and Alexander could only have reasonably understood that they were being addressed as consumers and not as employees of WZLX. Thus, the calls to boycott Busch and WZLX could not have been reasonably understood as "a signal or request" that Paquin, Nunnery, and Alexander engage in a work stoppage against WZLX, their employer. Finally, Paquin, Nunnery, and Alexander did not, in fact, withhold their services from WZLX. It cannot be said, therefore, that the picketers' conduct was "designed to induce or encourage" Paquin, Nunnery, and Alexander, in their status as employees of a secondary employer, to withhold their services from WZLX. Accordingly, we shall dismiss this 8(b)(4)(i)(B) allegation.

2. Scope of the Order

As to the remedial issues set out above, the judge found that the Respondent had a proclivity to violate Section 8(b)(4)(B) of the Act and therefore found that a broad cease-and-desist order was required to enjoin the Respondent from engaging in future secondary activity proscribed by Section 8(b)(4). In reaching this conclusion, the judge relied on the fact that on three occasions during the course of its consumer boycott campaign the Respondent had engaged in conduct which warranted the issuance of injunctions under Section 10(l) of the Act. Of these three incidents, two involved conduct which was part of the allegations in this case (at the Pour House and Woody's Liquors). The third, which involved "group shopping" allegations, was settled after 4 days of trial. The formal settlement agreement included a nonadmissions clause.[9] For the following reasons, we find that this evidence does not establish that the Respondent had a proclivity to violate the Act.

As the Board explained in *Iron Workers Local 378 (N. E. Carlson Construction),* 302 NLRB 200, 200 (1991) (emphasis added):

> In *Hickmott Foods*, 242 NLRB 1357 (1979), the Board held that a broad remedial "order is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for . . . fundamental statutory rights." The Board has applied the *Hickmott* standard in tailoring remedial order language to protect the rights of neutral employees and employers to be free from secondary activity proscribed by Section 8(b)(4)(B). E.g., *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 (1989). *A determination of the need for a broad order in each case turns on the nature and extent of violations committed by the respondent.*

In determining that a broad cease-and-desist order was warranted here, the judge found, in effect, that the 10(l) injunctions issued against the Respondent and the formal settlement evidenced violations committed by the Respondent. However, it is well settled that neither preliminary injunctions issued pursuant to Section 10(l) of the Act nor formal settlement agreements which include a nonadmissions clause establish that a respondent has actually committed violations of the Act. As to the former, the Board observed in *Brotherhood of Teamsters Local 70*, 191 NLRB 11, 11 (1971), that "preliminary injunctions based on a showing of reasonable cause to believe a violation has occurred . . . do not establish that violations of the Act have in fact been committed."[10] As to the latter,

> [u]nder Board precedent, formal settlement stipulations which contain a nonadmissions clause have no probative value in establishing that violations of the Act have occurred and therefore they may not be relied on to establish a proclivity to violate the Act.[11]

The Supreme Court first interpreted the scope of the words "to induce or encourage" in *International Brotherhood of Electrical Workers, Local 501, et al. [Samuel Langer] v. N.L.R.B.,* 341 U.S. 694 (1951). In that case, in the context of finding peaceful picketing to be a form of inducement or encouragement proscribed by Section 8(b)(4) where it had [a] secondary object, the Court stated:

> The words "induce or encourage" are broad enough to include in them every form of influence and persuasion. [p. 701].

Since then, the Board has repeatedly found unlawful any statement which agents of a union make directly to the employees of a secondary employer *if such statements would reasonably be understood by the employees as a signal or request to engage in a work stoppage against their own employer.*

[9] In finding that a broad cease-and-desist provision was warranted, the judge also relied on the fact that a complaint alleging similar conduct was issued, and subsequently settled, as part of the earlier consumer boycott campaign against Burke Distributing. Since the record does not establish that the settlement agreement that was part of the Burke Distributing case was a formal settlement agreement without a nonadmission clause, we shall not rely on it as evidence that the Respondent had a proclivity to violate the Act, for the reasons set out at fn. 11 below.

[10] See also *Carpenters (Reeves, Inc.),* 281 NLRB 493, 499 (1986).

[11] *Sheet Metal Workers Local 28 (Astoria Mechanical),* 323 NLRB 204, 204 (1997) (footnote omitted). In *Painters District Council 9 (We're Associates),* 329 NLRB 140, 143 (1999), the judge noted that

> informal settlement agreements and formal settlement stipulations containing non admission clauses cannot be used [to establish a proclivity to violate the Act]. . . . Thus, the only type of settlement agree-

Accordingly, since the preliminary injunctions and the formal settlement agreement do not establish that the Respondent has, in fact, committed violations of the Act, we cannot find that the Respondent has a proclivity to violate the Act. We therefore conclude that a broad remedial order is not warranted here. We shall modify the judge's recommended Order by substituting a narrow remedial order for the broad order included there.

3. Litigation costs

The judge found that the Respondent violated Section 8(b)(3) by, inter alia, failing and refusing to bargain in good faith with Busch during their negotiations for successor agreements to the collective-bargaining agreements that expired in November 1994. As part of the remedy for the violations, the judge ordered the Respondent to pay Busch and the General Counsel their litigation costs for that portion of the trial in which the 8(b)(3) allegations were litigated. For the reasons set out below, we agree with the judge that Busch and the General Counsel should be awarded their litigation costs.

In finding that both Busch and the General Counsel should be awarded their litigation costs, the judge relied on the Board's decision in *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). We agree with the judge that both Busch and the General Counsel should be awarded their litigation costs. In making the award of litigation costs we rely on both Section 10(c) of the Act which grants the Board broad remedial authority to "effectuate the policies of [the] Act," and our inherent authority to control our own proceedings through an application of the bad-faith exception to the American Rule against awarding litigation expenses.[12] As we explained in *Frontier Hotel & Casino*, 318 NLRB at 864:

> the Supreme Court has recognized that the American Rule is not absolute, and that in certain exceptional cases an award of attorney's fees is appropriate, even in the absence of a legislative grant of authority, where "overriding considerations indicate the need for such a recovery." *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391–392 (1970). Among these equitable exceptions is the bad-faith exception, under which "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116 129 (1974). . . . In *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the Court acknowledged that the bad faith required by the exception "may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation" 447 U.S. at 766 (quoting *Hale v. Cole*, 412 U.S. 1, 15 (1973)).[13]

We find that both aspects of bad faith are present here.

The Respondent's bad faith in negotiations with Busch has been fully set out by the judge. In brief, the Respondent pursued a two-prong strategy in its negotiations with Busch with the objective of forcing Busch to sell the distributorship to an employer who would more readily reach an agreement favorable to the Respondent. To achieve this goal, the Respondent engaged in a strategy of delaying negotiations while waging a consumer boycott campaign against Busch, a strategy which, as noted above, the Respondent had previously employed with success against a Busch competitor, Burke Distributing, the Miller Beer distributor in the Boston area. As John Murphy, the Respondent's secretary-treasurer, explained in the June-July 1994 edition of *The Labor Page* (GC Exh. 35):

> Making good use of the Local's lawyer, Stephen Domesick, the union used detailed bargaining as part of their [sic] strategy—by dissecting and arguing over every sentence that [Burke] put on the table, making detailed requests for information, and analyzing each answer. From August 20, 1991 to September 22, 1993, 40 negotiating meetings were held. . . . This strategy translated into time to develop the most successful consumer boycott ever seen in Massachusetts. . . . By January 1994, Miller Brewing Company recognized that the only way to end the boycott was to get rid of Burke Distributing and sell its franchise to an employer who could do business with the union. Two months later, Metropolitan Distributing Company became the new Miller wholesaler and negotiated a decent contract with Teamsters Local 122.

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agreements that can be used to establish proclivity to violate the Act is a formal settlement, without a non-admission clause.

[12] As the Board explained in *Alwin Mfg. Co*., 326 NLRB 646, 647 fn. 6 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999):

> In its decision in *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, the court (Judge Wald dissenting) found that the Board did not have the authority, under Sec. 10(c) of the Act, to order a respondent to pay litigation costs incurred by the charging party and the General Counsel. The court majority stated, however, that it was not addressing the issue of whether, notwithstanding the lack of statutory authority, the Board might have the inherent power to control its own proceeding through an application of the bad-faith exception to the American Rule against awarding litigation expenses. 118 F.3d at 800 fn. *. For the reasons stated by Judge Wald in her partial dissent, we find that we have this inherent authority. 118 F.3d at 810, 812.

[13] See also *Alwin Mfg. Co.,* 326 NLRB at 647–648; *Lake Holiday Manor*, 325 NLRB 469 (1998).

The Respondent used this same strategy in bargaining with Busch. By compelling Busch to bargain separately for new contracts in the two units, by meeting only 32 times in the driver unit and only 17 times in the plant unit over a 2-year period, by bargaining for only short periods of time when the parties did meet for bargaining, the Respondent purposely delayed the negotiating process. Further evidence of the Respondent's desire to frustrate the negotiating process is evidenced by its use of its lawyer to engage in "detailed" bargaining and story telling to stall negotiations. The Respondent's own burdensome information requests were also designed to frustrate the bargaining process, as was its refusal to furnish information requested by Busch. Clearly, as in its negotiations with Burke Distributing, the Respondent's bargaining strategy was not to reach an agreement, but to delay the bargaining process to give its consumer boycott campaign time to work against Busch—as it had against Burke. In sum, by using the bargaining process as a weapon to achieve its goal of forcing Busch to sell the distributorship, the Respondent amply demonstrated its bad faith in negotiations.

We further find that the Respondent's bad faith exhibited in bargaining continued during the litigation of the 8(b)(3) allegations and also warrants the award of litigation costs. As the judge explained, the Board will award litigation costs where the defenses raised are "frivolous" rather than "debatable."[14] See *Frontier Hotel & Casino*, 318 NLRB at 860. We agree with the judge that the Respondent's defenses were frivolous because, simply put, the Respondent chose not to put on any defense to the 8(b)(3) allegations. Rather, as the judge found, by presenting "such a frivolous defense, Respondent made the Board into an instrument of its own unlawful conduct." The Respondent did so by using this portion of the hearing not to mount a defense against the 8(b)(3) allegations, but to delay the bargaining process by engaging in a 10-day cross-examination of Pat Knepper, Busch's general manager, a cross-examination which the judge described as "abusive" and which only ended when the judge intervened (Tr. 3777). As the judge further found, the Respondent's lawyer engaged in the same "detailed" strategy and story telling in cross-examination as he had in bargaining, and with the same purpose, to delay the bargaining negotiations by drawing out the litigation.

In sum, the Respondent's bad faith during negotiations and its continued bad faith during the litigation of the 8(b)(3) allegations fully warrant the award of litigation costs to Busch and to the General Counsel. In making this award, we agree with Judge Wald's statement in her partial dissent in *Unbelievable, Inc. v. NLRB*, 118 F.3d at 810 (footnote omitted), that:

> There can be scant doubt that awarding attorney's fees to a charging party who has been subjected to surface bargaining and bad faith, frivolous litigation effectuates the policies of the NLRA by directly remedying the economic injury incurred by the party. In this regard, reimbursement for expenses of litigation is no different from compensation for the costs of bad faith negotiation, which the majority approves in this very case.

Having found that Busch and the General Counsel should be awarded their litigation costs, we next address the issue of whether Busch should be awarded its negotiation expenses.

4. Negotiation expenses

The judge declined to award Busch its negotiating expenses because he found that although Busch "needlessly spent a great deal of its resources in the one sided bargaining process," it still had the economic strength to continue bargaining, while if the Respondent were ordered to pay negotiating expenses, it would put the Respondent "in such an unfavorable financial position" that it would not have the economic strength to return to the bargaining table and adequately negotiate on behalf of its members. For the following reasons, we find that Busch should be awarded its negotiating expenses as well as its litigation costs.

In *Frontier Hotel & Casino*, 318 NLRB at 859, the Board set out the standard it would apply in determining whether negotiating expenses should be awarded. There the Board stated that:

> [i]n cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.,* 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. . . . [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.

[14] Chairman Hurtgen agrees with the award of litigation costs, but only on the basis that the Respondent's defenses in the litigation were "frivolous" rather than "debatable."

In our view, the Respondent's bad faith in negotiations, as described in the judge's decision and set out at section 3 above, establishes beyond doubt that the Respondent's unfair labor practices "infected the core of [the] bargaining process to such an extent that their 'effects cannot be eliminated by the application of traditional remedies.'" This is so because the Board's traditional remedy of an affirmative bargaining order, standing alone, will not make Busch whole for the financial losses it incurred in bargaining with the Respondent, financial losses which the Respondent directly caused, and intended to cause, by its strategy of bad-faith bargaining. Reimbursement of negotiation expenses is therefore warranted to make Busch whole for the costs of its negotiations with the Respondent over a 2-year period and to restore the status quo ante. In reaching this conclusion, we note that the judge himself apparently found that such an award was warranted here, but that he declined to give it from fear it would place the Respondent at a disadvantage at the bargaining table. We find that the judge erred by focusing on the result of such an award, i.e., the Respondent's potential financial disadvantage, rather than on the justification for such an award, i.e., that the award of negotiation expenses "reflects the *direct causal relationship* between the respondent's actions in bargaining and the charging party's losses." *Frontier Hotel & Casino*, 318 NLRB at 859 (emphasis added). In the present case, not only was there a direct causal relationship between the Respondent's actions in bargaining and Busch's losses, but the Respondent's very objective in bargaining was to create such losses to weaken Busch financially and to force it to sell to another employer. To refrain from awarding Busch its negotiation expenses in these circumstances would, in effect, reward the Respondent for its bad faith in bargaining. We decline to reach such a result here.

Finally, in awarding Busch its negotiation expenses, we note that neither the General Counsel nor Busch excepted to the judge's failure to award those expenses. However, the absence of exceptions does not foreclose the Board from fashioning a remedy designed so far as possible to restore the status quo ante,[15] for "[i]t is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct." *Westpac Electric*, 321 NLRB 1322, 1322 (1996). Accordingly, we shall order the Respondent to reimburse Busch its negotiation expenses. The award of negotiation expenses will both dissipate the effects of the Respondent's failure to bargain in good faith and will help restore the parties to their relative economic positions prior to the commencement of the bargaining process.

[15] As the Supreme Court explained in *Franks v. Bowman Transportation*, 424 U.S. 747, 769 (1975):

> The task of the NLRB in applying § 10(c) is "to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *Carpenters v. NLRB*, 365 U.S. 651, 657 (1961) (Harlan, J. concurring).

ORDER

The National Labor Relations Board orders that the Respondent, Teamsters Local Union No. 122, International Brotherhood of Teamsters, AFL–CIO, Boston, Massachusetts, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Picketing or any similar or related conduct or in any other manner inducing or encouraging any individual employed by the Pour House, WZLX-FM, or Woody's Liquors to engage in a strike or refusal, in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to refuse to perform any other services, where an object thereof is to force or require that person to cease doing business with August A. Busch & Co. of Massachusetts, Inc.

(b) Picketing or any similar or related conduct, or by any other means, threatening, coercing, or restraining the Pour House, WZLX-FM, or Woody's Liquors, where an object thereof is to force or require that person to cease doing business with August A. Busch & Co. of Massachusetts, Inc.

(c) Threatening or assaulting employees or supervisors of the Employer, August A. Busch & Co. of Massachusetts, Inc.

(d) Refusing to bargain collectively with August A. Busch & Co. of Massachusetts, Inc. by refusing to furnish it with information relevant and necessary to the bargaining process and for monitoring the Respondent's contractual commitments, including information concerning its exclusive hiring hall and health and welfare plan.

(e) Refusing to bargain collectively with the Employer by failing to meet at reasonable times and for reasonable periods of time and failing to confer in good faith with respect to wages, hours, and other terms and conditions of employment.

(f) Engaging in any like or related conduct restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish immediately to August A. Busch & Co. of Massachusetts, Inc., the Employer, all information in its possession or control requested in the Employer's letter dated November 2, 1994, as reflected in attachment A to the complaint and notice of hearing in Case 1–CB–8563.

(b) Furnish immediately to the Employer all information in its possession or control requested in the Employer's letter dated November 14, 1994, as reflected in attachment B to the complaint and notice of hearing in Case 1–CB–8563.

(c) On request, bargain in good faith with the Employer with respect to wages, hours, and other terms and conditions of employment, and if an agreement is reached, reduce that agreement to writing.

(d) Pay to the Charging Party Employer and to the General Counsel all litigation costs incurred by them in the trial of that portion of these proceedings dealing with the 8(b)(3) complaint allegations, in the manner set forth in the remedy section of the judge's decision.

(e) Pay to the Charging Party Employer its expenses incurred in collective-bargaining negotiations from the commencement of negotiations on October 13, 1994, until September 11, 1996, the date of the last negotiating session.

(f) Within 14 days after service by the Region, post at its union office and hiring hall in Boston, Massachusetts, and on any union bulletin board(s) maintained by it at the Employer's facility in Medford, Massachusetts, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix" to all members and spare employees who were employed by the Employer at its Medford, Massachusetts facility at any time from the commencement of negotiations on October 13, 1994, to January 16, 1998, the date of the judge's decision. The notice shall be mailed to the last known address of each of the members or spare employees after being signed by the Respondent's authorized representative.

(h) Within 14 days after service by the Region, provide the Employer sufficient copies of the notice to members for posting by the Employer, if willing, at all places where notices to employees are customarily posted.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT by picketing or any similar or related conduct, or in any other manner induce or encourage any individual employed by the Pour House, WZLX-FM, or Woody's Liquors to engage in a strike or refusal, in the course of his employment, to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to refuse to perform any other services, where an object thereof is to force or require that person to cease doing business with August A. Busch & Co. of Massachusetts, Inc.

WE WILL NOT by picketing or any similar or related conduct, or by any other means, threaten, coerce, or restrain the Pour House, WZLX-FM, or Woody's Liquors, where an object thereof is to force or require that person to cease doing business with August A. Busch & Co. of Massachusetts, Inc.

WE WILL NOT threaten or assault employees or supervisors of August A. Busch & Co. of Massachusetts, Inc.

WE WILL NOT refuse to bargain collectively with August A. Busch & Co. of Massachusetts, Inc. by refusing to furnish it with information relevant and necessary to the bargaining process and for monitoring our contractual commitments, including information concerning our exclusive hiring hall and health and welfare plan.

WE WILL NOT refuse to bargain collectively with August A. Busch & Co. of Massachusetts, Inc. by failing to meet at reasonable times and for reasonable periods of time and failing to confer in good faith with respect to wages, hours, and other terms and conditions of employment.

WE WILL NOT engage in any like or related conduct restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish immediately to August A. Busch & Co. of Massachusetts, Inc. all information in our possession or control requested in the Employer's letter dated November 2, 1994.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL furnish immediately to August A. Busch & Co. of Massachusetts, Inc. all information in our possession or control requested in the Employer's letter dated November 14, 1994.

WE WILL, on request, bargain in good faith with August A. Busch & Co. of Massachusetts, Inc. with respect to wages, hours, and other terms and conditions of employment, and, if an agreement is reached, WE WILL reduce that agreement to writing.

WE WILL pay to August A. Busch & Co. of Massachusetts, Inc. and to the General Counsel of the National Labor Relations Board all litigation costs incurred by them in the trial of that portion of these proceedings dealing with our failure to bargain in good faith with August A. Busch & Co. of Massachusetts, Inc.

WE WILL pay to August A. Busch & Co. of Massachusetts, Inc. its expenses incurred in collective-bargaining negotiations with us.

TEAMSTERS LOCAL UNION NO. 122, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL–CIO

Kevin J. Murray, *Esq*., for the General Counsel.
Stephen R. Domesick, Esq., of Boston, Massachusetts, for the Respondent Union.
James Bucking, Esq., of Boston, Massachusetts, for the Charging Party.
Caryn Fine, Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Boston, Massachusetts, on June 3–6, August 5–9, September 16, October 1–3 and 7–10, November 12–15 and 18–20, 1996, and January 21–23, February 25, and March 3, 1997. The charges and amended charges in this matter were timely filed. Various complaints and amendments to the complaints were issued against Teamsters Local Union No. 122, International Brotherhood of Teamsters, AFL–CIO (Respondent or the Union). Respondent filed answers to each complaint and amendment. At trial, on August 5, 1996, counsel for the General Counsel moved to amend the complaint in Case 1–CC–2541 to delete certain subparagraphs and to add others. This amendment was granted. Respondent orally denied the new allegations at trial. At trial, on August 5, 1996, counsel for the General Counsel further moved to consolidate the consolidated complaint in Cases 1–CB–8563 and 1–CB–8597 for trial with the complaints in Cases 1–CC–2529, 1–CC–8727–2, and 1–CC–2541. This motion was granted over Respondent's objection.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

August A. Busch & Co. of Massachusetts, Inc. (Busch or Employer), a corporation, maintains a place of business in Medford, Massachusetts, from which it engages in the wholesale distribution of beer in the Boston area. It is admitted that it meets the jurisdictional requirements of the National Labor Relations Act (the Act) and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Teamsters Local Union No. 122, International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Background and Issues for Determination

August A. Busch of Massachusetts, Inc. maintains a beer storage and distribution facility in Medford, Massachusetts.[2] From this facility it distributes Anheuser Busch products to package stores, bars, and restaurants and other retail beer outlets in the greater Boston area. For many years the Union has represented two units of Busch's employees, one called the drivers unit and the other the plant clerical and merchandisers unit. The plant unit consists of about 25 employees and the drivers unit consists of about 200 drivers, helpers, and warehousemen. Each unit has a separate contract reflecting the different nature of the work of the units. The most recent contract covering each unit expired on November 13, 1994.

Prior to the contracts expiration, Busch's management had decided to change certain aspects of the working conditions of the units. These changes primarily affected the drivers unit and were designed to afford the Employer more day-to-day consistency in its work force and to reduce its dependency on the Union's hiring hall for spare drivers and helpers. To say the least, these proposed changes did not meet with acceptance by the Union. As will be shown hereinaftter, it began a pattern of surface bargaining, evidently to buy time for a consumer boycott campaign it instituted against Busch shortly after negotiations began. In the recent past, it had waged a similar campaign against the Miller Brewing Co. distributor in Boston and had forced that distributor to accede to its position. However, the campaign against Busch has not been successful.

Respondent has engaged in a variety of types of activities as part of its consumer boycott campaign against the Employer. Respondent initially engaged in about 10 "group shopping" trips. This conduct consisted of large numbers of Respondent's members and supporters "shopping" in retail liquor stores which did business with Busch. Respondent's members and supporters entered the stores at the same time, generally stayed

[1] The General Counsel and Charging Party have filed motions urging me to strike the brief filed by Respondent. These motions are overruled.

[2] The transcript in this proceeding has a major page number error. The first week of hearing, June 2–6, is covered in pp. 1–858. The second week of hearing, August 5–9, is covered by pp. 430–1384. There are duplicating page numbers for hearing days June 5 and 6 and August 5, 6, and 7. The pages involved are 430 through 858, some 428 pages in all.

for about an hour, milling in the store and clogging aisles and made small purchases with large denomination bills, creating long checkout lines and deterring business from the retailer. Respondent's conduct was aptly titled by Business Week magazine as "The Teamsters' Shoppers From Hell." This group shopping conduct was enjoined under Section 10(l) of the Act by the United States District Court on a petition filed by the Regional Director. *Pye v. Teamsters Local 122,* 875 F.Supp. 921 (D.Mass. 1995), affd. 61 F.3d 1013 (1st Cir. 1995). The underlying unfair labor practice case was thereafter settled on the fourth day of litigation.

Respondent has engaged in about 200 "standouts," which are defined by Respondent as demonstrations where members hold consumer boycott signs and banners at locations of high visibility, such as highway intersections.

Respondent has engaged in a series of "publicity events." This conduct includes demonstrating with consumer boycott signs and banners and handbills outside an establishment, such as a restaurant or bar, that serves or sells Busch products, but also entering the establishment acting as consumers, telling consumers why they are boycotting, distributing "Budweasel"[3] stickers and urging them to support the boycott at the point of purchase. There have been 50–60 such publicity events. About 5–10 of these publicity events have been held by Respondent at promotions jointly conducted by Busch with a radio station. One such publicity event conducted by Respondent was at the Pour House on December 8, 1995.

Conduct engaged in by Respondent at the Pour House publicity event was enjoined by the United States District Court pursuant to a petition for injunction filed by the Acting Regional Director under Section 10(l) of the Act. *Simmonds v. Teamsters Local* 122, 928 F.Supp. 71 (D.Mass. 1996). The enjoined conduct included making oral appeals to customers by Respondent's pickets not to patronize the Pour House and engaging in conduct which interfered with the promotion, including the shouting of anti-Busch slogans.

Finally, Respondent has also engaged in conduct it terms "demonstrations," defined as holding banners and placards and distributing leaflets and "Budweasel" stickers at locations where Budweiser is featured prominently. Such locations include sporting venues such as Fenway Park, Boston Garden, Fleet Center, and Suffolk Downs. John Murphy, Respondent's secretary-treasurer, was unable to precisely describe the number of such demonstrations, which were perhaps in the neighborhood of 50.

Conduct engaged in by Respondent at its demonstration at Woody's Liquors on May 3 and 10, 1996, was enjoined by the United States district court pursuant to Section 10(l) of the Act. *Pye v. Teamsters Local 122,* Civil No. 96-11250-PBS (D.Mass. 1996). The enjoined conduct included confronting and intimidating customers, entering or blocking customers cars, physically or verbally harassing customers or employees, preventing employees from parking or performing services and damaging employee's vehicles.

This consolidated proceeding was tried in three separate, but related, segments. The first segment concerned allegations relating to the Union's demonstration at the Pour House on December 8, 1995 (the Pour House conduct). The second segment concerned allegations concerning the Union's demonstrations at Woody's Liquors on May 3 and 10, 1996 (the Woody's conduct). The final segment concerned allegations related to the collective-bargaining negotiations between Respondent and the Employer which have been conducted since October 1994 (the bargaining conduct). This decision is set out in the same manner.

B. The Pour House Incident

1. Issues related to the Pour House incident

a. Did the Union's picketing violate Section 8(b)(4)(i) and (ii)(B) due to appeals by pickets to prospective customers not to patronize neutral persons?

b. Did the Union's demonstration and related conduct inside the Pour House during a promotion conducted by radio station WZLX-FM constitute unlawful restraint and coercion of neutral persons in violation of Section 8(b)(4)(i) and (ii)(B)?

c. Did members of Respondent bump and threaten employees and supervisors of the Employer during the Pour House demonstration in violation of Section 8(b)(1)(A) and (4)(i) and (ii)(B)?

d. Is Respondent liable for the conduct engaged in by its members and supporters during the demonstration at the Pour House on December 8, 1995?[4]

2. Background to the Pour House incident from the Union's prospective

The Union is run by its secretary treasurer, John Murphy, a former Busch employee. As pertinent to this proceeding its officers are James Hoar, president; Thomas Curtin, trustee; Robert Smith, night steward; John Shea, alternate steward; Joe Riley, alternate steward; and Dominic DiLoretto, who along with Curtin and Smith are members of the Union's negotiating team. Under Murphy's guidance, the Union engaged in a number of tactics in its boycott campaign. It had produced a large number of picket signs, one bearing a comic depiction of a weasel, called Budweasel. The sign says, "This Bud's not for you." Another set of signs say, "Boycott Bud." One member made a sign saying "Union Busting Is Family Busting," and he displayed this sign at publicity events.[5] Members of the Union, both Busch employees and others not employed by Busch who were union members, and others who were not members, but

[3] The "Budweasel" logo has been used by Respondent on stickers and placards throughout its dispute with the Employer. The logo is a cartoon depiction of a weasel in Budweiser clothing inside a circle with a line drawn through it. Respondent has distributed over 400,000 such stickers during the course of its consumer boycott campaign against the Employer.

[4] All dates in this section of the decision are in 1995 unless otherwise noted.

[5] The complaint in this matter initially contained an allegation that Respondent's picket signs did not meet the legal requirements of adequately informing the public of the nature of the dispute so that the businesses of secondary employers were properly protected. Following the decision of the district court in the 10(l) injunction case, this allegation was reconsidered. The General Counsel determined, based on the facts of this case, that the allegation concerning the language on the signs be withdrawn.

supported the cause, would gather in various places in and around Boston and display their signs to passing motorists and pedestrians.[6] Murphy called these gatherings "standouts." They would also conduct demonstrations at various places where Busch products were sold, including package stores and bars. They also demonstrated at crowd drawing events such as baseball and basketball games and at places where Busch employees showed up to promote beer sales. It also conducted what it calls "publicity events." These are almost identical to a demonstration, except that union supporters, in addition to demonstrating outside the target of the demonstration, also enter the premises. The Pour House incident was one such publicity event.

Respondent's conduct has evolved from its conduct in the prior labor dispute involving the Burke Distributing Co., the Boston distributor of Miller Beer and Busch's primary competitor. Respondent engaged in a virtually identical consumer boycott against Burke utilizing the same tactics as it has against Busch. These tactics, set out briefly above, were described by John Murphy in *The Labor Page* article he authored in June 1994. The confrontational nature of these tactics was admitted by Murphy, who described them as "in your face activities." These same confrontational tactics carried forward into the consumer boycott of Busch.

John Murphy testified that he attempts to attend and be in charge of all of the gatherings of union supporters to further the boycott, be it a standout, demonstration or publicity event. On occasion he is unable to attend and in those instances, Union President James Hoar is in charge. According to Murphy, if neither is present, as was the case with the Pour House incident, no one is authorized to be in charge. This is contradicted by the testimony of Union Steward John Shea, who testified that he was in charge of the Pour House demonstration and took it upon himself to tell the bar's manager and some police security on the premises to come to him if there were problems.

Union member, and in December 1995, union trustee, Thomas Curtin, testified about the procedure for calling and attending demonstrations. Curtin has been informed of standouts in the past by Union President Jimmy Hoar, alternate Shop Steward Joe Riley, and Busch employees Frank Senna and Barry Wright. He himself has called others to attend a demonstration or standout. Curtin testified that a list of attendees is made for each event by Murphy if he is present and by Joe Riley or Jimmy Hoar if Murphy is not present. Riley made the list at the Pour House event. Murphy testified that he maintains attendance lists at standouts and demonstrations in order to protect the Union from false claims of improper action at the events. No demonstrations or publicity events are held without Murphy's approval. Thus if one is called, like the Pour House, the Union and its officers are responsible, whether they attend or not. Murphy authorized the Pour House event and caused members and supporters to be notified about the event. Moreover, picket signs and banners used at the Pour House demonstration were paid for by the Respondent. A handbill, edited and approved by Murphy, was distributed at the Pour House to its customers.

3. Background to the Pour House incident from the prospective of Busch and WZLX-FM

In 1995, Busch and Boston radio station WZLX-FM engaged in a joint promotion effort. On Friday nights, the station staged a Busch sponsored, 2-hour live broadcast originating from a local bar or restaurant that has an account with Busch.[7] This broadcast was called Chuck's Bar and Grill and was hosted by a station disk jockey, Chuck Nowlin, who, inter alia, would conduct on the air trivia contests, engage in conversations with patrons of the involved establishment and give away trivia contest prizes. Prizes given to patrons were usually items promoting the station, Busch products, or other station advertising accounts. The station tried to create a fun, lively atmosphere to enhance the station's image and increase its listenership. Busch sponsored the events to further the sales of its products.

During the fall of 1995, following the expiration of the first injunction in the group shopping case, Respondent held publicity events during three Chuck's Bar and Grill promotions run by WZLX-FM—at the Harp, a promotion which was canceled, at the New Place and at Jose MacIntyre's. Respondent engaged in a variety of conduct which disrupted these promotions, including heckling the DJ Chuck Nowlin. Because of Respondent's disruptions, Nowlin refused to perform any further promotions. WZLX-FM canceled the Chuck's Bar and Grill promotions because of Respondent's interference. After some discussions, WZLX-FM agreed to one more promotion conditioned on Busch providing a security detail for the safety of station personnel. WZLX-FM had the right not to broadcast live because of the potential of Respondent's heckling over the air.

Following this agreement with Busch, the station scheduled a show to originate at the bar called the Pour House, on Boylston Street in downtown Boston. The Pour House show was promoted in advance. The Union attended this promotion in large numbers, some 31 supporters showing up to demonstrate. Some of the union supporters sat inside the restaurant while others picketed outside with the signs noted above. Because the night was cold, some demonstrators would picket for a while and then change places with a demonstrator inside the bar. It is alleged in the complaint that the actions of the outside picketers had a secondary object, evidenced by the actions of the members in appealing to potential patrons of the bar not to enter the establishment. Members inside are alleged to have violated the Act in a number of ways. It is alleged they deliberately shouted anti-Busch slogans during the broadcast to disrupt the promotion and engaged in confrontations with patrons. They are alleged to have won and destroyed prizes during the promotion and passed out Budweasel stickers to patrons. Certain members are alleged to have threatened Busch management and engaged in physical bumping of members of Busch's management. The actions of the members at the Pour House destroyed the fun atmosphere of the promotion, and taken together with other demonstrations that had occurred at prior Chuck's Bar and Grill

[6] The signs are transported from demonstration to demonstration by either a member or a user of the hiring hall.

[7] Busch is the station's largest sponsor, amounting to about 4 or 5 percent of the station's total revenue.

broadcasts, led the station to believe it could no longer participate in the joint promotion with Busch.

Chris Paquin, general sales manager of WZLX-FM, testified that his station has no labor dispute with the Union, and has no corporate relationship with Busch. The Pour House show was to differ from previous ones in that the station chose not to do the live, on air broadcast element of the promotion. This was because some previous shows had been disrupted by the Union, and an unpleasant atmosphere had been created, defeating the fun purpose of the promotions.[8] This decision not to broadcast the show live had not been announced to the public and was not announced to the patrons of the Pour House on the night of the promotion. In addition, the regular disk jockey for the series refused to do the show because of the unpleasantness of the previous shows where the Union had demonstrated. Because of these past problems, Paquin attended the Pour House show to see for himself what disruptions the Union caused.

4. Actions on the picket line

The show's timeslot was 5 to 7 p.m. Paquin arrived about 10 or 15 minutes after 5 p.m. As he approached the restaurant, he saw 8 or 10 picketers outside its front door. Paquin entered the restaurant quickly to avoid dealing with the picketers. They yelled at him as he entered, urging him not to enter the premises, asking why he wanted to go in, and telling him to boycott Bud. It was Paquin's perception that the picketers were encouraging him not to patronize the Pour House. A similar experience was had by Kathleen Nunnery, who at the time, was employed by WZLX-FM as an account executive. She attended the Pour House promotion with a female friend visiting from out of town. She arrived at the Pour House at 5:30 or 5:45 p.m. and saw 10 to 12 picketers wearing Teamsters insignia. As she entered the establishment, the picketers asked her why she was going in and told her she did not want to go in. She believed they were asking her not to enter the bar. Additionally, the picketers moved toward her as she entered the bar and she felt they were trying to physically intimidate her and her friend.

Susan Alexander is employed as an account executive with the station and is in charge of the Busch account. She testified that the Chuck's Bar and Grill promotions had been going on for 4 years. She attended the promotion at issue here and as she entered the bar, was handed a flyer by one of the picketers. The flyer depicts a man with his hair forming devil's horns standing over a pile of money, with a graph on the wall behind him showing profits going up. It states in bold letters, "Budweiser bloats profits by squeezing its workers. You can fight the Bud Bloat." It states in smaller letters, "help us: keep our jobs, protect a decent standard of living, provide for our families and prevent 'voluntary retirement' of older workers. Anheuser-Busch scored record profits in 1994. Growing profits as the workers' expense is a bad brew. Call Budweiser at (phone number) and tell them you're boycotting Bud and Bud Light." Upon leaving the bar later that evening, Alexander heard a picketer shout, "Boycott Bud and WZLX."

I credit the testimony of Paquin, Nunnery, and Alexander as set out above.

5. Actions inside the Pour House affecting the station's ability to conduct the promotion

When Paquin went inside the bar, he saw some station personnel, including the replacement disk jockey for the night, Tom Sheridan, engaged in setting up a station display table. There were seven or eight persons in a group on the other side of the room. One member of this group was wearing a number of Union insignia and thus Paquin assumed the group was composed of union supporters. In addition to this group and the station employees, there were about 10 or 12 other patrons in the bar area of the restaurant. They were grouped at the back of the bar area near a narrow hallway to another bar room and the bathrooms. About twenty after 5 p.m., Sheridan went to the microphone which transmitted a signal to a PA system. He welcomed the crowd to the Pour House and the night's promotion. Almost immediately, he was greeted by a chorus of Budweasel heckles and shouts of boycott Bud from the group of union supporters. Had the broadcast been live, the shouts would have been heard over the air.[9] One witness described the activity as trying to interrupt Sheridan and stop patrons from having fun. This break ended and a few minutes later, Sheridan began a trivia give away contest.[10] He asked a question which was answered correctly by a patron, who was given a hat. The next question was answered correctly by a union supporter and he was given a hat. This man threw the hat to the floor, stomped on it, then picked it up, and tried to tear it. This hat had on it the logo of another sponsor of the station, not Busch. Paquin noted to the man that he had just destroyed a good hat that did not mention Bud. The man then threw the hat in the direction of Sheridan. Paquin described the atmosphere as hostile. Paquin told Sheridan to stop the promotion and Sheridan turned off the microphone. As soon as he did this, the heckling stopped. Sheridan was very upset. Paquin looked around and saw that a number of customers had left during the heckling episode.

Nunnery also testified about the events inside the promotion. As she entered she observed a group of men standing in front of Sheridan. They were shouting at him, saying Budweasel. He

[8] WZLX Account Executive Susan Alexander had attended another Chuck's Bar and Grill promotion in November at a bar/restaurant called The New Place. She testified that at this promotion there were a large number of union supporters inside and many were drunk. The disk jockey was giving away prizes to persons who put their names in a box from which he drew winners. The union people were putting names like Budweasel on the slips as well as the names of Busch's managers. There was also shouting of boycott Bud and Budweasel at this promotion. At the next promotion, similar events occured. The station then decided future promotions would not be live broadcasts.

[9] Some witnesses presented by the Union, including Shea and Lesniak, indicated that it was nonunion patrons who yelled Budweasel and Boycott Bud. I do not believe this testimony and do believe that given by Paquin and the other radio station employees. I make the same credibility determination with respect to the atmosphere of the upper bar, where the promotion was being held. Thus, in this regard, I credit the witnesses presented by the General Counsel over those presented by the Union. I found the testimony of the union witnesses in this regard to be fabricated.

[10] Some witnesses identified this as the first microphone break by Sheridan, and others the second such break. All remembered that there were two breaks. I accept the version as recounted above.

was holding a torn hat one of the men had thrown to him. As soon as he cut off the mike, the men quieted down. Some of these men wore union insignia. She said that Sheridan, who is very comfortable with public appearances, appeared frazzled. He did not conduct any more giveaways that evening.

Paquin described the situation as bad for the station, the restaurant, and Busch. Nunnery, the station account executive assigned to the Busch account, felt that the demonstration, and especially the treatment of Sheridan was aimed at the station. She was unhappy with the demonstration because it meant the station would cease this type promotion for Busch and would cause her problems with her account. For the next hour, the station just played music in contrast to its usual procedure of doing from four to eight trivia breaks per hour. About 6:15 p.m., they were asked to leave by the bar manager.

At about this time, Nunnery observed Sheridan on the public phone in the bar's hallway. As he left the phone, he engaged in some conversation with the union men and became very uncomfortable. Another station employee went over and pulled him away from the group. She described the atmosphere in the bar as tense and not a fun place you would want to be after work. She testified that the union men were trying to take over the bar and it made the other patrons uncomfortable. She described other Chuck's Bar and Grill promotions where no demonstrations had occurred and described them as a really good time with patrons having fun. She said these were the direct opposites of the scene at the Pour House.

The station personnel left about 6:30 p.m. to the applause of the union supporters. Paquin believed this signified that they had won a victory getting the station and Busch people to leave. When Paquin left, he noticed that the picketers were still in front. As noted above, prior to this event, there had been demonstrations at other station promotions with Busch and the station had given notice to Busch, it might stop them if problems continued. After the Pour House incident, the Chuck's Bar and Grill promotion was ended for the year and did not resume until the summer of 1996, when the district court issued its injunction in the companion 10(l) case. In the period between the Pour House promotion and the next one held, about 8 to 10 other promotions would have been held except for the Union's actions.

I credit the testimony given by Paquin and Nunnery as set out above and to the extent that testimony offered by Respondent contradicts it in whole or in part, that testimony is discredited.

6. Actions by union supporters with neutral patrons of the Pour House

Busch's retail service supervisor, Ronald Sanchez, attended the demonstration from about 5:45 p.m. until its conclusion around 6:30 p.m. During the course of the evening, he observed inside the bar Dominic DiLoretto, a member of the negotiating team, Bobby Smith, the Union's night steward at Busch, Joe Riley, an alternate shop steward, and John Shea, alternate shop steward. Sanchez observed these union members talking with patrons and in some instances, giving patrons Budweasel stickers. Sanchez testified he overheard a comment by a patron that one of the union members had yelled at a woman customer, "I gave you a sticker, where the fuck is your sticker."

Busch's marketing coordinator, Pat McCoy, attended the promotion from about 4:30 until 6:30 p.m. Just before he left, he saw union member John Shea approach two patrons and give them a Budweasel sticker. The patrons had been drinking Bud, but purchased another brand after speaking with Shea.

Eric Holt is a Busch group marketing coordinator who attended the Pour House promotion. While he was in the bar he saw a union supporter approach a male and female patron. He told the man, "Don't drink Budweiser." The male patron responded, "I want to drink Budweiser. Why don't you leave me alone." The union supporter continued, "You don't understand the situation. Hey, this is what's going on." The two continued arguing, their voices rising. The union supporter moved close to the patron, who got up. At this point another union supporter pulled the one arguing away. The police in the bar moved to the area, and were stopped by the patron, who said the confrontation was over. This testimony was more or less corroborated by Union Alternate Steward John Shea, who identified the union supporter as Charlie Campbell. Shea was the union supporter who pulled Campbell away from the situation.

Shea also testified, inter alia, that while he was in the bar, he began talking with two young women and a man at the bar. They asked what his Budweasel sticker was about and he told them. They then refused a free beer being offered patrons by Busch. He offered a sticker to the group and the women and the man took one. The women went to the restroom and when they returned, one raised her skirt and showed Shea she had affixed her sticker to her leg.

Union member and demonstrator at the Pour House, Carmen Cecere, testified that while at the Pour House, he was asked by four male patrons what the demonstration was about. He explained and they thereafter did not buy any more Budweiser products. He later spoke to three people at the bar who wanted to know what was going on. He explained and offered to pay for a replacement drink for the Buds they were drinking. They took him up on the offer.

I credit the testimony and evidence set out above. To the extent that there is any testimony in the record which contradicts it in whole or in part, I discredit the contradictory testimony.

7. Actions taken against Busch management during the demonstration

a. The cursing and bumping of Pat McCoy

At about 6:10 p.m., Busch Marketing Coordinator Pat McCoy went to the bar's pay phone. Upon his return, he had to pass through a group of union supporters. One of these supporters, Carmen Cecere, said to a Busch spare employee, Jeff Lesniak, "Here comes one of the weasels." Lezniak then bumped McCoy in the back as he passed by.[11] This incident

[11] As will be discussed in more detail in a different context, Busch employs a number of permanent drivers, helpers, and warehousemen on a permanent basis. However, because of fluctuations in demand for product on a day-to-day basis, and because of absenteeism problems, it relies to a significant extent on the use of spare employees sent on a daily basis from the Union's hall. Some spares work virtually full time

was observed by Ronald Sanchez, who corroborated McCoy's testimony. Lesniak asserts that when McCoy walked through the group of union supporters he "flagrantly" bumped shoulders with Lesniak. Lesniak denies knowing McCoy was associated with Busch until after the bumping incident. Union member Carmen Cecere also testified that McCoy bumped Lesniak, but described the incident differently than Lezniak. Having considered the matter at length, I credit the testimony of McCoy and Sanchez and discredit that of Respondent's witnesses.

When McCoy first arrived at the Pour House that evening, he was greeted by a number of picketers. One of them, Tom Curtin, yelled at him, "There goes the pussy." As McCoy left the premises later, Curtin called out to him from a booth in the bar, "Fucking faggot." I credit McCoy's testimony and discredit that of Respondent's witnesses, including Curtin, to the contrary.

b. The bumping and threatening of Ronald Sanchez

Shortly after the McCoy bumping incident, Sanchez was discussing it with McCoy. A union member, Tommy Curtin, bumped Sanchez in the back. Sanchez turned and, according to Sanchez, Curtin said, "Watch who the fuck you're bumping into." Sanchez replied, "Tommy, I didn't bump into you." Curtin again accused Sanchez of bumping into him and Sanchez again denied it. The encounter ended with Curtin yelling "fuck you," to Sanchez. McCoy was present for this incident, but did not see the bumping occur. Curtin had been a long time employee of Busch who had been fired in August 1995 for taking Busch advertising banners from Busch's trash.

Curtin, who shortly before this incident had been picketing, came back into the bar at 5:30. He testified that he made his way through a crowd and accidentally bumped into Sanchez, who, according to Curtin, made an exaggerated move backward, pushing Curtin back. Curtin testified that he said, "What do you think you are doing?" Sanchez said, "You pushed me." Curtin denied this accusation and Sanchez said, "Fuck you, you did." Curtin then said, "Fuck you, you fucking piece of crap," and walked away. Curtin denies saying anything to McCoy in the bar and denied hearing anyone else he was with say anything to McCoy. I credit Sanchez' testimony in this regard and discredit that of Curtin.

Later in the evening, Sanchez had a conversation with Busch employee and union member Lou LaRosa near the pay phone. LaRosa approached Sanchez and asked if he knew Charlie Campbell.[12] Sanchez said he knew him, and LaRosa said, "He told me to tell you he's going to be your worst nightmare. He told me to tell you he's going to be the nigger in your daughter's bed." LaRosa at this point turned and walked away, saying "[I]t was worth the $20.00 I got to tell you that." Sanchez said, "$20.00?" LaRosa said, "Yes, it was worth it to tell you." McCoy was present for this conversation and corroborated Sanchez' testimony.

Sanchez has a young daughter, a fact known to LaRosa. Sanchez viewed LaRosa's statement as a threat, reporting the incident to local police and his children's school. At his request, Busch paid to have a security system installed at his home.

Louis LaRosa was employed by Busch as a spare in March 1986 and made a regular employee in September 1989. LaRosa testified that while at the Pour House on December 8, Campbell, a man in his mid-40s, was chasing some young women around the bar and joking with LaRosa. LaRosa commented that he should quit robbing the cradle, that LaRosa had two young daughters himself. Campbell said that LaRosa should be careful or he would come chase LaRosa's girls, adding that would be LaRosa's worst nightmare, a black man waking up in his daughter's bed. At one point in his direct testimony he indicated this is what he told Sanchez. At a later point, he testified that he told Sanchez, in response to Sanchez asking him why he was laughing, "Charlie Campbell." According to LaRosa, Sanchez said, "Yeah?" LaRosa said, "He could be your worst nightmare." Sanchez said, "How's that?" LaRosa replied, "A black man in your daughter's bed." Busch's management did not believe this story, nor do I. I credit the testimony of Sanchez and McCoy in this matter and discredit the testimony of Respondent's witnesses in this regard.

The Pour House incident ended at around 6:15 or 6:30 p.m. when the bar's manager told McCoy that he was canceling the promotion. The manager told Shea he was canceling the event and asked Shea to have the union supporters leave the premises. McCoy passed the word on to the radio station personnel, and the Busch promotion team and the radio personnel left with the police security unit at about 6:30 p.m.

8. Respondent's picketing at the Pour House violated Section 8(b)(4)(i) and (ii)(B) of the Act by its oral appeals not to patronize the Pour House and to boycott WZLX-FM

The picketing Respondent conducted at the Pour House on December 8, 1995, was in furtherance of its consumer boycott campaign against the primary employer, Busch. There is no contention that Respondent was engaged in any labor dispute with The Pour House, a retailer of Busch products, or with WZLX-FM, which advertised Busch products. The Supreme Court has found such consumer boycott activity to be lawful where it is employed only to persuade customers not to buy the struck product of the primary employer with whom the union has a dispute. The picketing must be directed only at the struck product of the primary employer and must be fully isolated from the neutral employer's own business. *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58 (1964).

In *Fruits & Vegetables,* the Court distinguished the situation where consumer picketing is employed to persuade customers not to deal at all with a secondary employer, finding such picketing to be prohibited. The Court stated, in relevant part, 377 U.S. at 63–64:

> All that the legislative history shows in the way of an "isolated evil" believed to require proscription of peaceful con-

at Busch, though dispatched to work there from day to day. Spares may or may not be members of the Union. Union members pay monthly dues of $34 and nonmember spares pay hiring hall fees of $40 a month to be referred for work.

[12] Charlie Campbell is a black warehouse employee of Busch and is a union member. He was at the Pour House during the promotion. Following this incident, Campbell and LaRosa were interviewed by upper management, and subsequently LaRosa was fired.

> sumer picketing at secondary sites, was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon, the primary employer. This narrow focus reflects the difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute.

Thus, while Respondent might lawfully use consumer picketing as a device to urge a boycott of the products of the primary employer, Busch, it must do so in ways which protect the business of secondary employers, such as WZLX-FM and the Pour House.

The object of Respondent's picketing is determined not only from the language on the picket signs it employs, but also from the words and conduct of its members displaying those signs. The picketing cannot be found lawful because the picket signs meet the legal requirements if the pickets themselves engage in conduct which is inconsistent with the stated objective of the signs.

The unlawful objective of otherwise lawful picketing can be shown by oral statements made by pickets or other agents of Respondent. When, in those cases, the picketing cannot be separated from the accompanying statements explaining its unlawful purpose, both the picketing and the statements must be found to be unlawful. *Electrical Workers Local 11 (L .G. Electric Contractors)*, 154 NLRB 766, 768 (1965).

In consumer boycott picketing, where the union was urging a boycott of nonlocal soft drinks, an unlawful object was found by the Board where the pickets exhorted customers to shop at another supermarket and booed customers who purchased products the pickets regarded as nonlocal. *Soft Drink Workers Local 812 (Monarch Long Beach Corp.)*, 243 NLRB 801, 806 (1979).

The statements made by the pickets at the Pour House could not have conveyed more clearly the unlawful object of Respondent's picketing. Respondent's pickets on at least two separate occasions stated to customers approaching the Pour House things such as "Don't go in there!" "You don't want to go in there" and "Why are you going in there?" To Chris Paquin and Kathleen Nunnery, it was evident that the pickets were urging them not to patronize the Pour House and the promotion being conducted within. Such urging by Respondent's pickets goes well beyond merely urging a boycott of Busch products, as described in the picket signs. Respondent, in fact, was urging a total cessation of business by prospective customers with both the Pour House and with WZLX, which was conducting the promotion inside. Similarly, Susan Alexander, upon exiting the Pour House that evening, was specifically exhorted by a picket to boycott both Busch and WZLX.

These statements clearly demonstrate that the object of Respondent's picketing went beyond what is permitted under *Fruits* by urging customers not to do any business with either the Pour house or WZLX. Such statements cannot be separated from the picketing and render the picketing unlawful. *Broadcast Employees Local 31 (CBS, Inc.),* 237 NLRB 1370, 1376–1377 (1978), enfd. 631 F.2d 944 (D.C. Cir. 1980). Respondent, rather than isolating the business of neutral employers from its consumer boycott of Busch, enmeshed these neutral employers in the labor dispute, demonstrating an unlawful secondary object. Id.

Similarly, the Respondent's picketing cannot be separated from its conduct inside the promotion at the Pour House, discussed below. The unlawful object of Respondent's picketing can further be inferred by the unlawful nature of Respondent's conduct within the promotion itself, occurring simultaneously by many of the same individuals and in furtherance of the same objective. Moreover, Respondent's own definition of a "publicity event" calls for boycott activity inside the premises while picketing occurs outside.

That the statements and picketing had the desired effect can be inferred from the testimony of the WZLX employees who stated that the number of customers was far lower than normal and declined, rather than increased, as the promotion went on.

The testimony of Paquin, Nunnery, and Alexander concerning these unlawful statements was not rebutted by Respondent. While the statements were not attributed to any particular picket, Respondent produced Thomas Curtin, Jeff Lesniak, and John Shea to testify about the picketing. Each testified he was on the picket line at the time these comments were made. Yet none was asked, and none rebutted, the testimony of Paquin and Nunnery concerning the picket's oral appeals not to enter the Pour House during the 5–5:30 p.m. time period. No picket was called to rebut Alexander's testimony either. Inasmuch as Respondent is solely aware of the identity of the participants and their locations during the demonstration,[13] an adverse inference will be drawn from Respondent's failure to call other members, whom it may be reasonably assumed are favorably inclined toward Respondent, to rebut these statements, and from its failure to question the members it did call concerning them. *Grimmway Farms,* 314 NLRB 73 fn. 2 (1994).

As Paquin, Nunnery, and Alexander were employees of WZLX attending as part of their employment, the oral appeals by pickets to them constituted an unlawful inducement to them under Section 8(b)(4)(i)(B) to withhold their services from their employer, WZLX. Paquin, Nunnery, and Alexander each attended the promotion as part of their duties for WZLX. The oral appeals by pickets not to enter the Pour House and to boycott WZLX were an inducement to them to abandon their duties and support the Union in its boycott campaign.

The Supreme Court has observed: "The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." *Electrical Workers IBEW Local 501 v. NLRB, 3*41 U.S. 694, 701–702 (1951). In *Broadcast Employ-*

[13] Though subpoenaed from Respondent, the attendance list maintained by Respondent at the event was reviewed by me *in camera* and not shown to the General Counsel or Charging Party.

ees Local 32 (CBS, Inc.), supra, a union which had a dispute with a television network handbilled a hotel where a news event was occurring with handbills urging people not to enter the hotel because the primary employer was inside covering the news event. The Board found that the union's conduct constituted a form of inducement and encouragement to employees of other networks within the meaning of Section 8(b)(4)(i)(B) not to perform their duties. See also *NLRB v. Servette, Inc.*, 377 U.S. 46, 52–54 (1964) (attempts to induce the exercise of a manager's discretion to cease doing business with the primary employer violate Sec. 8(b)(4)(i)(B) if the inducement would "threaten, coerce or restrain" the exercise). Respondent's appeals were coercive in nature, as shown by Paquin's testimony of how he wanted to avoid a confrontation with the pickets, and were in the context of Respondent's coercive conduct during the promotion.

Accordingly, the oral appeals by Respondent not to enter the Pour House and to boycott WZLX during the course of its consumer picketing unlawfully enmeshed neutral employers in its labor dispute with Busch, causing the appeals and the picketing itself to be in violation of Section 8(b)(4(i) and (ii)(B).

9. Respondent's conduct inside the Pour House violated Section 8(b)(4)(ii)(B) and (1)(A)

Section 8(b)(4)(i) and (ii)(B) makes it unlawful for a labor organization or its agents to induce or encourage employees to withhold services from their employer or to threaten, coerce or restrain any person where an object is for that person to cease doing business with another employer. This provision reflects the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *NLRB v. Denver Building Trades Council,* 341 U.S. 675, 692 (1951).

However, Section 8(b)(4) proscribes more than just picketing. It proscribes all conduct where it was the union's intent to coerce, threaten or restrain third parties to cease doing business with a neutral employer, or to induce or encourage its employees to stop working, although this need not be the union's sole objective. *NLRB v. Denver Building Trades Council,* supra at 688–689. See also *NLRB v. Fruits & Vegetable Packers*, supra, 377 U.S. 58, 68 (1964).

The Board has stated: "It is well settled that picketing (or other coercive conduct) violates Section 8(b)(4) if the object of it is to exert improper influence on a neutral party." *Mine Workers District 29 (New Beckley Mining Corp.),* 304 NLRB 71, 73 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992). Unlawful secondary conduct includes "conduct which does not constitute actual picketing but which, nevertheless, induces or encourages employees and restrains and coerces employers." *Service Employees Local 87 (Trinity Maintenance),* 312 NLRB 715, 743 (1993). The Act prohibits "actions which '[overstep] the bounds of propriety and [go] beyond persuasion' so as to become 'coercive to a very substantial degree.'" Id. (Brackets in original.)[14]

An unlawful intent may be inferred from the "foreseeable consequences" of the union's conduct, *NLRB v. Retail Store Employees Local 1001,* 477 U.S. 607, 614 fn. 9 (1980); *Mine Workers District 29 (New Beckley Mining Corp.),* supra at 73; the nature of the acts themselves, *Electrical Workers Local 761 v. NLRB,* 366 U.S. 667, 674 (1961) (quoting *Seafarers International Union v. NLRB,* 265 F.2d 585, 591 (D.C. Cir. 1959)); and from the "totality of the circumstances." *Mine Workers District 29 (New Beckley Mining),* supra at 73. See also *Plumbers Local 32 v. NLRB,* 912 F.2d 1108, 1110 (9th Cir. 1990).

The Board has found many types of conduct to be "coercive" even though they did not involve any strike or picketing activity. See, e.g., *Sheet Metal Workers Local 80 (Limbach Co.),* 305 NLRB 312, 314–315 (1991); *United Scenic Artist Local 829 (Theater Tecniques, Inc.),* 267 NLRB 858, 859 (1983), enf. denied on other grounds 762 F.2d 1027 (D.C. Cir. 1985); *Service Employees Local 399 (Delta Airlines, Inc.),* 263 NLRB 996, 999 (1982), enf. denied 743 F.2d 1417 (9th Cir. 1984); *Carpenters Local 742 (J. L. Simmons Co.),* 237 NLRB 564, 565 (1978); and *Ets-Hokins Corp.,* 154 NLRB 839, 842 (1965).

Confrontational conduct is also coercive under Section 8(b)(4). *Service Employees Local 87 (Trinity Maintenance),* supra; *Chicago Typographical Union 16 (Alden Press),* 151 NLRB 1666, 1669 (1965). See also *Laborers Local 332 (C.D.G., Inc.),* 305 NLRB 298 (1991) (surrounding a building and blocking entrances for half hour followed by a rally went beyond the mere attempt to convey a message by handbill and, where there was a demonstrated proscribed object, constituted restraint and coercion).

These principles stated by the Board aptly apply in this matter. As admitted by John Murphy in *The Labor Page* (GC 35), Respondent had a history of engaging in confrontational, "in your face" conduct as part of its previous boycott campaign against Burke Distributing. Respondent has carried forward these same confrontational tactics to its dispute with Busch. Respondent has engaged in a variety of conduct described by Murphy as group shopping trips, standouts, publicity events, and demonstrations. Each has its own type and level of confrontation and coercion. On three occasions, the Board has successfully obtained injunctions from the United States district court under Section 10(l) of the Act enjoining the confrontational conduct of Respondent defined as group shopping (the Kappy's injunction), publicity events (the Pour House injunction), and demonstrations (the Woody's injunction).

According to Murphy, union publicity events include picketing and leafleting outside a retail establishment which sells Busch products, as well as having union members enter the premises posing as consumers in order to talk to consumers at the point of purchase to convince them to support Respondent's boycott of Busch products. Murphy conceded the Pour House was such a publicity event. The facts demonstrated that Respondent's members engaged in far more than mere conversa-

[14] Citing *Mine Workers District 29*, supra at 72; and *Service Employees Local 399 (William J. Burns Detective Agency)*, 136 NLRB 431, 437 (1962).

tion when conducting a publicity event inside that retail establishment.

Beginning in the fall of 1995, after the expiration of the group shopping 10(l) injunction, Respondent conducted at least three publicity events at Chuck's Bar and Grille promotions prior to the Pour House event on December 8. Respondent's conduct at these events was virtually identical to its later conduct at the Pour House. WZLX found it to be so disruptive and coercive of its promotion that it canceled the remaining events in the series, agreeing to attempt one more only after Busch met certain preconditions.

Respondent's conduct inside the promotion at the Pour House continued its disruption and coercion of these events. WZLX employees Paquin and Alexander described the fun party atmosphere they try to create at these events through music, contests, prize giveaways, and patron interaction with the disc jockey. It is the creation of this atmosphere which makes the promotion a success for all involved. The testimony of the witnesses from WZLX and Busch demonstrates that this fun party atmosphere was destroyed by the conduct of Respondent's members. Respondent's conduct "overstepped the bounds of propriety" so as to become coercive to a substantial degree of WZLX and the Pour House. *Service Employees Local 87 (Trinity Maintenance),* supra at 746.

There can be no legitimate purpose ascribed to Respondent's members loudly shouting anti-Busch slogans while the disc jockey is attempting to broadcast over a microphone. That the members shouted only when the disc jockey was on the microphone is telling of Respondent's true objective, particularly when they did not know that this event, unlike the others they had attended, was not being broadcast live. John Murphy admittedly did not discourage this anti-Busch shouting for he believed it to be acceptable. This shouting of slogans certainly brought attention to Respondent's cause, but did so in an unacceptable manner that disrupted the radio broadcast and restaurant promotion in an eminently foreseeable manner. Thus, the foreseeable consequences of the act show Respondent's unlawful motive. *NLRB v. Retail Store Employees Local 1001,* supra; *Mine Workers District 29 (New Beckley Mining),* supra. Destroying prizes in front of patrons which had been won in contests and throwing them back at the disc jockey demonstrates a similar unlawful intent.

The large number of members sent into the Pour House by Respondent further demonstrates its unlawful intent. Its boycott message had already been conveyed to those in attendance and passers by through its picket signs and handbills. Yet some estimates showed that about half the crowd in the Pour House was composed of Respondent's members, who were older than the other patrons and gathered themselves in groups. They created an intimidating presence in the center of the bar.

As part of the strategy of a publicity event, Respondent's members confronted customers in the Pour House, initiating conversations about their boycott and, in some instances, distributing Budweasel stickers to patrons. Lou LaRosa bragged to Ron Sanchez about how successful he had been at getting patrons to switch brands from Busch products. One such confrontation almost resulted in a physical altercation with a patron where a union member had to be restrained by his cohorts. These unwarranted solicitations by Respondent were another attempt to further its cause at the cost of undermining the atmosphere of the promotion. Respondent had no legal right to engage in such solicitations or distribution of literature, including Budweasel stickers, inside the private property of the Pour House or any other retail establishment. See *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992).

Respondent's members further undermined the promotion by bumping and threatening Busch supervisors and employees inside the Pour House. The facts demonstrate that these were deliberate attempts to intimidate, coerce and injure Busch supervisors and employees, as well as employees of WZLX and the Pour House, who were performing their duties during Respondent's boycott activities.

Jeff Lesniak deliberately bumped Pat McCoy, a Busch employee who was physically smaller than he, after Carmen Cecere identified him as one of the "weasels." Cecere's comment shows the motivation for the bump.

Tom Curtin, who stated a dislike for supervisors, admitted to bumping Ron Sanchez from behind, then, in a not believable fashion, accused Sanchez of bumping him, escalating the confrontation into a war of profanity. Curtin's conduct was a further effort to intimidate Busch supervisors and employees who are present during Respondent's boycott events.

There is virtually no dispute about the statement Lou LaRosa made to Ron Sanchez. The only real issue is whether it was a joke, as LaRosa claimed, or a threat, as taken by Sanchez and McCoy. The comment must be viewed as a threat. Both Sanchez and McCoy testified credibly about the threat. Sanchez even produced an almost verbatim version of LaRosa's comment, which he wrote down shortly after the incident. LaRosa's testimony was more evasive. Moreover, he claimed to be repeating a comment from fellow employee Charlie Campbell, a claim Campbell did not back up to the Employer or to John Murphy. An adverse inference will be be drawn from Respondent's failure to call Campbell, a union member who could reasonably be assumed to be favorable toward Respondent. *Grimmway Farms*, 314 NLRB 73 fn. 2 (1994). Thus, there is no basis for crediting LaRosa that he was repeating a joke. Rather, he was making a threat to a supervisor who he knew, from living in the same town, had young daughters of his own. Such threats to injure made, in the presence of employees, neutrals, and the public, violate Section 8(b)(1)(A) of the Act.

Assaults of employees and threats to employees in connection with picket line activity coerce employees in the exercise of their Section 7 rights and violate Section 8(b)(1)(A). Similarly, assaults and threats to supervisors in the presence of employees are coercive of employees and violate Section 8(b)(1)(A). *Auto Workers Local 65 (T. B. Woods's),* 311 NLRB 1328, 1337 (1993); *Teamsters Local 812 (Sound Distributing),* 307 NLRB 1267 (1992); and *Teamsters Local 812 (Pepsi-Cola Newburgh),* 304 NLRB 111 fn. 1 (1991). Accordingly, the deliberate bumping of employee McCoy and the bumping and threat to Supervisor Sanchez in the presence of McCoy and other employees violate Section 8(b)(1)(A). In these circumstances where the threat and bumping were part of an organized plan to disrupt the promotion conducted by neutrals with

Busch, this conduct restrained and coerced the neutrals as well and violated Section 8(b)(4)(ii)(B).

The nature of the conduct itself, as well as its foreseeable consequences on neutrals such as WZLX and the Pour House, warrants the conclusion that Respondent had an unlawful intent behind its publicity event at the Pour House. *Electrical Workers Local 761 v. NLRB,* 366 U.S. 667 (1961); *NLRB v. Retail Store Employees Local 1001,* 477 U.S. 607 (1980); and *Mine Workers District 29 (New Beckley Mining Corp.),* 304 NLRB 71 (1991). Moreover, Respondent's intent was trumpeted by John Murphy in *The Labor Page*, where he described the tactics used by Respondent in its earlier boycott against Busch's competitor Burke Distributing. Respondent considered that campaign to be a success. It utilized the identical confrontational, "in your face" tactics here as it had against Burke, despite the issuance of the prior unfair labor practice complaint.

The coercive nature of Respondent's conduct is shown by the testimony that patrons present did not appear to be enjoying themselves and that the number of patrons decreased, rather than increased, as the promotion went on. This would show that patrons were not enjoying the promotion. But the coercion is most graphically shown by the cancellation of future Chuck's Bar and Grille promotions until after the issuance of the 10(l) injunction by the United States District Court about 6 months later. Chris Paquin credibly testified that the sole reason for the cancellation was the interference by Respondent at several promotions. As Paquin described it, it was "absolutely unacceptable for a radio station to get into a tense confrontation at something that is supposed to be a fun party; that's not what our business is. Our business is to make people happy, not participate in situations that are uncomfortable, awkward or tense." This reaction by WZLX was certainly foreseeable by Respondent and, in all likelihood, was desired.

Accordingly, it must be found that Respondent's conduct inside the Pour House, where it had no legal right to demonstrate, had an unlawful object and was coercive under Section 8(b)(4).

10. Respondent is responsible under the Act for the conduct of its members and supporters on the picket line and inside the Pour House

Respondent denies any liability under the Act for the conduct of its members and supporters at the Pour House. Section 2(13) of the Act provides that:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized .. . . shall not be controlling.

Certainly, agency is established when there is actual, or express, authority to engage in the conduct. Among the other ways that agency can be established are through apparent authority and/or through ratification. As to apparent authority, in *D. G. Real Estate,* 312 NLRB 999 (1993), the Board stated that it applies the standard endorsed in *Dentech Corp.,* 294 NLRB 924, 925 (1989), quoting from *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82 (1988):

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn,* 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.,* 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must indeed intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that the conduct is likely to create such a belief. Restatement 2d, Agency §27 (1958, Comment). Two conditions, therefore must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. Id. at §8.

The Board further held that "ratification is defined as 'the affirmance by a person of a prior act that did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.'" An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it. *Service Employees Local 87 (West Bay Maintenance),* supra at 83.

Respondent imbued its members and supporters at the Pour House with express, as well as apparent, authority to engage in the misconduct committed therein. There can be no dispute that the Pour House demonstration was sponsored by Respondent, even in the absence of John Murphy. Murphy himself admitted the demonstration was a Local 122 event. The event was scheduled personally by Murphy who disseminated that information to the members. Murphy planned to be there, as he had been for virtually all of the other demonstrations, but for a last minute call to Washington on union business. The demonstrators used the Union's picket signs, which had been printed and paid for by Respondent and were used at all similar events. The handbills distributed at the Pour House were edited and approved by Murphy. At Murphy's request, attendance was taken so the Union would have a record of who was present. Murphy takes attendance at all such events and maintains the records in the union office.

John Murphy has orchestrated the Union's consumer boycott campaign against Busch. He alone schedules the various boycott activities and instructs participants on what to do. At the time of the Pour House event, no written instructions were given. Yet, Murphy clearly did not tell members *not* to enter the premises of a promotion, *not* to urge patrons inside to boycott Busch products, *not* to distribute "Budweasel" stickers or not to shout antiemployer slogans during the promotion. Murphy had authorized this conduct at prior promotions such as The New Place and Jose MacIntyre's where conduct virtually identical to that at the Pour House occurred. Either Murphy or Respondent's president, James Hoar, had been present when it occurred at those promotions. Murphy testified he saw nothing wrong with shouting anti-Busch slogans during the promotion. Thus, it is evident that he expressly authorized much of the disruptive behavior which occurred at the Pour House.

Rather, Respondent's argument that it bears no liability for the conduct rests on the fact that Murphy, himself, was not present. Murphy contends he left no one in charge of the event

in the absence of himself and James Hoar.[15] Thus, Respondent would have it that the Union can "sound the trumpet" to call its members to appear and demonstrate, yet bear no responsibility for their conduct in the absence of Murphy or Hoar. Such a contention defies law and logic.

In *Boilermakers Local 1 (Union Oil),* 297 NLRB 524, 526 (1989), the administrative law judge, quoting from *Boilermakers Local 696 (Kargard Co.),* 196 NLRB 645, 647–648 (1972), stated:

> [W]here a union authorizes a picket line, it is required to retain control over the picketing. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for their misconduct. If a union authorizes a picket line without supervision or control, it must bear the responsibility for the misconduct on the picket line. If a union exercises control and supervision on the picket line, properly disavows and corrects misconduct, naturally such misconduct would not appear to be pursuant to its authority.

Accord: *Auto Workers Local 695 (T. B. Wood's)*, 311 NLRB 1328 (1993).

Respondent has an affirmative obligation to make certain that agents with authority are present to supervise when it engages in picketing and other types of demonstrations. Respondent cannot be permitted to escape liability for its members' conduct by setting the wheels in motion for a demonstration, then failing to supervise what transpires. In *Avis Rent-A-Car,* 280 NLRB 580 fn. 3 (1986), the Board found a union could not escape responsibility for the misconduct of unidentified pickets simply by claiming its authorized agents were not present for the misconduct. In the same way, since John Murphy authorized this demonstration on behalf of Respondent, responsibility for the resulting misconduct cannot be avoided simply because Murphy failed to put someone in charge. Even were it to be found that a union official such as John Shea were in charge of the event, it is evident that the participants acted as they had at previous demonstrations in the manner authorized by Murphy and that neither Shea nor any other union official present, took any action to control their misconduct.

Certainly, Respondent's demonstrators were cloaked with apparent, if not express, authority. The members had been called to attend by Murphy and carried Respondent's signs, banners and handbills, which were under the exclusive control of Respondent. These facts alone would lead third parties to believe that the actions of the demonstrators had been authorized by their principal, a conclusion of which Respondent had to be aware. *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82, 83 (1988). Moreover, for WZLX and Busch, the actions of Respondent's members at the Pour House were entirely consistent with those they had observed at other locations, such as The New Place, Jose MacIntyre's, and the Union Street Restaurant, some of which had been attended by Murphy himself.

Respondent, further, ratified the conduct by failing to repudiate what occurred. At no point has Respondent repudiated the disruption of the promotion inside The Pour House through the chanting of slogans and destruction of prizes, the distribution of "Budweasel" stickers, the urging of patrons to switch brands and the confrontations with customers. Respondent made no disavowal of its members' oral appeals to patrons not to patronize the Pour House and to boycott WZLX.

While John Murphy claims to have investigated the threat and bumping incidents inside the Pour House, his "investigation" led him to conclude that only one of the events may have occurred. As to that, Murphy as a remedy removed Thomas Curtin from the negotiating committee, though not, apparently, from his right to participate in future demonstrations. Murphy then reinstated Curtin following his testimony in this matter. Other than a general statement that it does not condone unlawful activity, at no point did Respondent disavow or repudiate any of the alleged misconduct to Busch.

Accordingly, by failing to repudiate the misconduct committed by its members and supporters at the Pour House, Respondent has ratified such conduct and must be held responsible for it.

C. The Woody's Liquor Store Incidents

1. The issues related to the Woody's demonstrations

a. Did Respondent's conduct at its May 3, 1996 demonstration at Woody's Liquors violate Section 8(b)(4)(i) and (ii)(B) of the Act?

b. Did Respondent's conduct at its May 10, 1996 demonstration at Woody's Liquors violate Section 8(b)(4)(i) and (ii)(B) of the Act?

c. Was Woody's Liquors a primary employer on May 10, 1996?

2. Background to the Woody's demonstrations

Woody's Liquors (Woody's) is a retail liquor store owned and operated by John Wood. Daniel Mahoney is its manager and David Sokol and Scott Higgins are its delivery men and helpers. The store's only connection with Busch is that it purchases Busch products for resale to the public. It has no relationship with the Union and in the opinion of Wood is not involved in any labor dispute with the Union. Woody's is located on a main, multilane thoroughfare in Boston. The store itself is about 25-feet wide.[16] If one is standing at its entrance looking out, there is a driveway on the left separating Woody's from a furniture store. The drive goes to a loading dock used by the furniture store. Further down on the left is a bar, Sam McGuires, which is at an intersection. On the right of Woody's is a fenced in parking lot and further down on the right is a gas station.

3. The May 3 demonstration

On May 3, 1996,[17] at about 4 p.m., picketers supporting the Union showed up in front of Woody's. There were about 13 to

[15] Murphy's testimony contradicts the clear testimony of John Shea that he was in charge of the event. Murphy's testimony is a transparent attempt to rationalize a defense after the misconduct occurred.

[16] Despite its relatively small size, the store is one of Busch's largest accounts.

[17] All dates in this section of the decision are in 1996, unless otherwise noted.

15 picketers there with about 20 more picketing down the street near Sam McGuires. Of this group some were at McGuires, some across the street, and some in a median at the intersection. At least one witness noticed some near the gas station. With respect to the demonstrators at Woody's, at first they stood in the street near the curb in an empty parking space displaying their Budweasel and Boycott Bud signs.[18] They covered the entire width of the liquor store, standing shoulder to shoulder like a "human billboard." Each demonstrator held his sign face high or higher to attract the attention of passersby. Murphy was present with a clipboard and talked with the demonstrators. During the demonstration, Murphy and a Busch spare employee, Jerry Meyers, handbilled passersby and customers of Woody's.

Wood testified that in his opinion, the picketing intimidated his customers and potential customers. The location of the picketers made it difficult for customers in cars to park in front of the store. About 20 minutes into the demonstration, Wood called the police. The police came and spoke to the demonstrators, then left. In the days following the demonstration, customers came in and told Wood they had come by to purchase goods from his store during the demonstration, but were intimidated and did not come in because they did not want to get involved in the situation.

Mahoney testified that on May 3, at about 4:15 p.m., he attempted to make a delivery of liquor to a customer. He got Wood's Jeep Cherokee automobile from the parking lot next door and attempted to pull into the parking space in front of the store, which was occupied by about six picketers. According to Mahoney, all but one of the picketers moved from the street onto the curb. This picketer moved very slowly out of the way, causing Mahoney to take about 2 minutes just to pull completely into the space. As Mahoney got out of the car and entered the store, one or more picketers commented on his shirt, which advertised Harpoon beer. The picketers then moved back into the street and surrounded the car and continued to display their signs to passing motorists. About 15 minutes later, Wood told Mahoney that he did not want to create any problems and directed Mahoney to move the Jeep back to the parking lot next to the store.[19]

At the outset of the demonstration, Wood canceled all deliveries to avoid problems. After the police had come and gone, Wood called Busch's operations manager Frank Curtis. According to Curtis, Wood was upset and asked what Curtis was going to do about the situation as he was losing a lot of business. Curtis said he would come over shortly. Curtis went to the store with one of his supervisors, Bill Moriarty. The two Busch managers arrived at Woody's about 4:40 p.m. In the interim between the call to Curtis and his arrival at the store, several notable events are alleged to have occurred.

Mahoney testified that while the picketers were at the store, on two or three occasions, he overheard them tell customers entering the store, "Don't go into Woody's," "don't buy Bud," and hand them pamphlets. I credit this testimony.

Mahoney also testified an incident of a demonstrator and his actions toward a female customer of Woody's. According to Mahoney, a female regular customer named Lisa, double-parked outside the store while Wood's jeep was in the space directly in front of the store. She parked with about 2 feet of her car obscured from inside the store by the jeep and came in. She usually bought Bud beer, but told Mahoney that she was buying Miller instead because she did not want to have problems. Wood told her to buy what she usually buys. She expressed her concern that she would be harassed if she did. Wood convinced her to buy Bud and she did. She put the beer in a black bag[20] and went to her car. Murphy was standing beside the door to the store at the time. One of the picketers came up to her as she entered her car from the passengers side and slid over to the driver's seat. As she attempted to close the passenger door, this picketer "grabbed" the door and entered the car, sat on the passenger seat and looked into her bag. The woman pulled the bag away from him and the picketer remained in the woman's car from one to three minutes, depending on which witness's testimony is relied upon. During this time frame, another picketer stood in front of her car, placing his picket sign and his right foot on the car's bumper.[21] Delivery man Sokol testified that this picketer actually stood on the bumper and bounced up and down. When the picketer inside the car got out, the one in front of the car moved away and the woman drove away. On a subsequent visit to the store, this woman customer indicated to Mahoney that she did not know the man who entered her car.

Wood first related this incident to Curtis on May 7, when he and Curtis were talking about another problem. Wood at this time indicated that it was Meyers who got in the car. Cecere denied ever getting on the bumper of a car at the demonstration

[18] Busch's operations manager, Frank Curtis, recognized the demonstators in front of Woody's as union members and Busch employees.

[19] Murphy testified that Wood's vehicle remained parked in the space in front of the store for the entire demonstration.

[20] Woody's supplies its customers with a large black plastic bag with handles to carry purchased product from the store. One cannot know the contents of the bag without looking inside.

[21] Mahoney described the picketer in front of the car as being about 6 feet tall and weighing about 170 or 180 pounds, with a moustache. He was wearing a hat with his hair coming out the back. Sokol added that the hat was a New England Patriots hat. Wood gave a similar description of the man, except he said he was wearing a union cap. Wood and Sokol also testified that the picketer who got in the car was standing with Murphy passing out leaflets just before he followed the woman to her car and got in. This would have been Busch spare employee Jerry Meyers. Wood, however, in his cross-examination, identified the man as one of the picketers in his late thirties or early forties. On re-cross-examination, he amended this testimony to indicate that it was Meyers who got into the customer's car. Meyers denied that he got into any customer's car. He also wore some unusual clothing to the hearing and testified that this was what he wore at the demonstration on May 3. If in fact it was the clothing he wore, it is likely that someone would have remembered it. On the other hand, it may not have been the clothes he wore that day. I did not believe Meyer's testimony with respect to an alleged threat made by Curtis and find no reason to believe his denial that he entered the customer's car. Despite his protestations to the contrary, Murphy has demonstrated his willingness to let his members engage in confrontational behavior with members of the public during demonstrations.

and denied seeing any other demonstrator do so.[22] Cecere did testify about one female customer. According to Cecere, a woman stopped and double parked in front of the driveway to left of Woody's, got out and went in the store, taking a leaflet on the way in. As she exited, she told the picketers she was sorry, she could not help them out this time. The picketers asked for her help in the future and she said she would if she could. The picketers wished her a good night and she entered her car from the drivers side and left.

I believe the General Counsel has established that this incident occurred, crediting the testimony of Wood, Sokol, and Mahoney about the incident.

Mahoney also testified that another female customer left the store with her beer in a bag and one of the picketers attempted to open it and looked inside. He was foiled in this attempt by the customer, who pulled the bag away from him. Sokol testified that he observed four or five incidents of picketers trying to see what was in female customers' bags. These attempts were primarily made by Murphy or the man assisting him in passing out flyers at the front of the store. Sokol testified that he heard the man ask the customers if there was Bud in their bags. Wood testified that he saw two of his female customers treated in this manner by an unidentified demonstrator. Wood also testified that he heard demonstrator Carmen Cecere say to a customer leaving the store, "Make sure there's Miller Lite in that bag." Cecere denied making this statement and also denied touching or trying to look into Woody's customers bags or seeing any other demonstrator do so. Murphy testified that he asked customers leaving the store to take a leaflet, and most of these customers agreed but said they could not hold it because they were holding the bag of beer. Murphy would then slip a leaflet into the beer bag. The customers taking these leaflets were of both sexes. I credit the General Counsel's witnesses in this regard and find that the demonstrators were in fact opening customer's bags without the customer's approval.

Frank Curtis arrived at Woody's at about 4:40 p.m., inter alia, he observed 15 picketers in the street in front of the store surrounding a car parked there. They were chanting and displaying their signs to passersby. Busch spare employee Jerry Meyers was standing at the entrance to the store, handing out flyers to those who would take them. As Curtis entered the store, he asked Meyers if he was handing out leaflets to customers entering the store. According to Curtis, Meyers responded, "Yes, Frank, I have to work." Curtis then entered the store, walking around Meyers who was partially blocking the entrance. Carmen Cecere testified that he observed Curtis arrive and told a different story about his conversation with Meyers. According to Cecere, Curtis asked Meyers, "You're not telling people not to buy Budweiser, are you?" Meyers responded, "I'm not telling just one person; I'm asking everyone to help us out in our boycott against Anheuser Busch." Curtis then pointed his finger in Meyers face and said, "I'll remember you for this." Meyers testified similarly to Cecere though he testified his response to Curtis' question was, "I'm asking everybody to boycott Budweiser products, doing everything I can to save my job."[23] Curtis, on rebuttal denied the accusations made by Meyers, Cecere, and Murphy. Having heard all the witnesses to this incident, I believe Curtis to be the most truthful and credit his version of the incident. Accordingly, I find that he did not threaten Meyers.

Curtis spoke briefly with Wood and then went outside where he spoke with Murphy. Curtis asked if Murphy had organized the demonstration and Murphy said he had. Curtis asked him if he were in the "gray" area of the law, and Murphy responded, "That's up to you to decide." Curtis then went back in the store and listened to Wood complain about lost business because of the demonstration. According to Curtis, Wood pointed out several cars that slowed in front and then left without stopping, saying they were some regular customers who would ordinarily come in. The same situation existed with several pedestrians. Curtis observed Cecere standing on the sidewalk near the store's entrance with a picket sign resting at an angle on his shoulder. According to Curtis, on a couple of occasions, when a pedestrian approached him, he would make sudden movements with his body and sign, causing the pedestrians to either stop, lean back or jerk their heads or walk around him. Cecere testified that he was in the street displaying his picket sign and only came on the sidewalk twice, both times to say something to Murphy. He testified that on each occasion, he was only on the sidewalk a couple of minutes. He observed a female customer try to leave the store only to find her way blocked by Jerry Meyers. She had to ask him to move before he did so. Again, I believe Curtis testified truthfully and credit his testimony in this regard.

Though Wood initially stopped deliveries, he had a large one to make and instructed the stores' delivery men, David Sokol and Scott Higgins, to do so when someone from Busch arrived.[24] They got Higgins pickup truck and were circling the block when Sokol recognized Busch's operations manager Frank Curtis arriving at the store. Higgins started to park in a space that was a little to the left of the store, but it was filled with picketers who would not move and allow him to park. Immediately to the left of the store, if one is looking out from the store, is a driveway that goes to a loading dock in the building adjacent to the liquor store. In frustration, Higgins did a u-turn and backed down this drive, angling the truck so that it went on the sidewalk and up to Woody's front door. He continuously beeped his horn and moved at a deliberate speed that forced the picketers to move out of the way. When they reached the door, the men got out and loaded the truck. While they were

[22] Two witnesses who also demonstrated on May 3, Carmen Cecere and Tony Pini, testified that female friends of theirs came by in their cars and stopped in the street near the store. Pini testified that he had a conversation with his friend in the street, leaning in the window of the car. Murphy testified that Pini actually got in her car. Cecere testified that his girlfriend stopped (at) a Dunkin Donuts shop across the street from Jerry McGuire's bar and he went to talk to her there.

[23] Cecere admitted to being in the Federal building's hallway before his testimony in the company of Meyers and Respondent's counsel. There was a sequestration order in effect at the time. However, Cecere also admitted that Meyers was discussing his testimony in this meeting, at least the part about this threat. At the direction of Busch, Meyers was not allowed to work at Busch after May 3.

[24] Frank Curtis testified that the purchaser wanted this load delivered because he was afraid to pick it up because of the demonstration going on.

loading it, Curtis heard some of the demonstrators call the delivery men scabs and boo them. I credit the General Counsel's witnesses' testimony in this regard.

While Curtis was on the premises, he heard several customers who normally bought Busch products decline to do so saying they did not want to get involved and at least one expressed fear he would be hit if he did so. Again, I credit Curtis.

When Sokol arrived for work on May 3, he parked his 1980 Lincoln Continental car on the street in front of Woody's, in the parking space immediately to the left of the driveway that is to the immediate left of the liquor store. He arrived for work after the demonstrations started and it was parked there during the entire May 3 demonstration. The picketers noticed him because he had to beep his horn to get them to move so he could park. They were standing in the area of the furniture store driveway and grudgingly moved to let him park. About 5:30 p.m., he walked to his car and put the windows up. During the time of the demonstration, there were picketers standing near the car. About 6:30 p.m. on May 3, about a half hour after the picketers had ceased their demonstration and left, Sokol discovered some damage to his car. There was a 1-inch-thick by 2-inch-wide by 3-foot-long wooden stick lying on the street next to the front of the car and the left front directional light had been smashed. The was also a dent on passenger side of the car which Sokol contends had not been there before.[25] Mahoney believed that the stick was similar to the wooden sticks to which the picket signs were affixed.[26] On this day, one of the picketers asked Sokol why he was making it harder for them.[27] Sokol responded that he was just the delivery man, trying to make a living. This man was wearing a New England Patriots hat and had a mustache. (I believe there is a variance between the descriptions of this hat, though it was identified by all (as) a Patriots cap. The "old" Patriots' caps feature a depiction of a colonial minuteman and the "new' Patriots' cap have what was called an "Elvis" logo which though not thoroughly described in the record is apparently distinctively different.) Curtis identified the man as Carmen Cecere. Sometime after the May 3, Curtis was given a stick by Sokol, which stick Sokol told him was the one he found by his broken turn signal light. He also authorized Sokol to get an estimate of the cost to repair his vehicle and give it to him for review. According to Curtis, as of the date of hearing (August 8), he had not gotten the estimate.

No one saw the damage being inflicted to the car and I decline to find that it was inflicted by a union demonstrator or supporter. The car was parked on a public street and could have been damaged by anyone passing by. The stick which Sokol believes was used to cause part of the damage was not like the ones used by demonstrators to hold their signs. As I do not believe the evidence establishes that a demonstrator damaged Sokol's car, I will not find Respondent violated the Act in this regard.

[25] Though Sokol has insurance which would cover the damage to his car, he had not filed a claim because, according to him, Frank Curtis told him Busch would pay for repairs for the damage.

[26] When the stick in question was compared to the sticks used by the demonstrators for their signs, they did not appear to be the same.

[27] I credit Sokol's testimony in this regard.

4. The May 7 beer delivery problem

The next event involving Woody's occurred on May 7. Wood had ordered about 900 cases of beer on what is called a bill and hold basis, to be delivered on May 7. A bill and hold order is one which a Busch customer can make at a posted discount. To take advantage of the discount the beer must be delivered within 5 working days of the end of the month in which the order is placed. In the case of the involved order, May 7 was the last day for Woody's to accept the order without losing the discount. Five witnesses testified about the delivery. Woody's opens at 9:30 or 10 a.m. Sokol testified that he arrived at the store at 9 a.m. to find two Busch employees unloading beer. At that time, according to Sokol, it covered the sidewalk. He did not say anything, but went to an area in the parking lot where returnable empty bottles were kept and spent a while sorting them. He then went for coffee and when he returned, Mahoney had arrived. Mahoney testified that at this time, cases of beer were stacked on the sidewalk all along the length of the store. Mahoney testified that they were stacked so close to the store that he could not open the security grates over the stores windows and he had to move several cases to get into the store. When Wood arrived, he observed the almost 900 cases of beer on the sidewalk in front of the store. According to Wood, he had never experienced a delivery with this quantity of beer placed on the sidewalk. Wood testified that he told the Busch delivery driver and his helper that he could not open the store until the beer was off the sidewalk and the Busch employees started moving the beer. According to Wood, the driver said he had to use the phone and left.

Wood said the opening of the store was delayed until 10:25 or 10:20 a.m. until sufficient beer was moved to allow the opening. Mahoney and Sokol testified that they overheard Wood tell the Busch driver and helper who had unloaded the beer that he did not want the beer on the sidewalk, that he had to open the store and the grates. Responding to this, according to Sokol, the Busch employees started putting beer back on the truck. He assumed they were doing this to get it off the sidewalk. Wood, Sokol, and Mahoney went into the store and began working. At some point about half an hour later, he was standing with Wood when the Busch truck drove away. According to Sokol, Wood asked why they had left. He then called Busch. Wood testified that he told Busch employee Bill Moriarity that he had not refused the order and he needed the beer. The beer was redelivered later that day. When the redelivery arrived, some pickets also arrived with their Budweasel and Boycott Bud signs. One of them talked with the Busch driver and the others stood with their signs in front of the store until the delivery was finished. Wood was of the opinion that the pickets were there in response to the events of that morning. Murphy testified that he was told of the morning incident over the phone and directed the pickets to go to Woody's at the time of the redelivery. He testified that this action was in response to Wood's actions. However, there were no outward signs that the demonstrators were doing anything more than demonstrating against Busch and its products.[28]

[28] On May 28, the Union filed an unfair labor practice charge against Wood because of this incident. The Regional Director, in a formal

The Busch driver who delivered the morning load of beer was Thomas Tinlin. He was assisted by helper Joseph Zuffante. There were 863 cases of beer in this load, which was the only delivery Tinlin had to make that morning. Tinlin was to pick up empty returnable bottles at three locations after he finished the delivery. The delivery team left Busch's facility at 7:45 a.m. on May 7 and arrived at Woody's at 8 a.m. Tinlin knew that Woody's did not open until 10 a.m. Normally, Tinlin would not unload an order in advance of a store's opening because there may be beer included in the delivery in error and he would have to reload it. However, Woody's load was a "post off" day following the April offer and Woody's had to take delivery that day or lose the discount. Because of the nature of the load and the fact that Tinlin had not had problems with working in the past, he took the chance that Wood might refuse the order and began unloading it in advance of the arrival of Wood. Tinlin and Zuffante unloaded the beer. Tinlin denies stacking it so close to the building that the security gates could not be opened and he denied having stacked the beer in a manner that obstructed entrance to the store. He later testified that there was four or five inches between the row of stacked beer and the window grates. They stacked beer on the sidewalk leaving room for pedestrians to pass and stacked much of the load in the street.

According to Tinlin, Wood arrived a little before 10 a.m., about 15 minutes after the beer had been completely off-loaded from the truck. Wood first spoke to a delivery team from another beer distributor and then walked past Tinlin.[29] Tinlin said, "Good morning, John." Wood replied, "I have bad news for you." "I don't want the order." Tinlin asked if he wanted any part of it and Wood said he did not. Tinlin then went to a gas station up the street and called his supervisor, Ron Sanchez, for instructions. Sanchez told him to start reloading the beer on the truck, but slowly so someone from Busch could call Wood and try to convince him to accept the order. He returned to Woody's and saw the delivery men from the other distributor wheeling beer into Woody's. It took Tinlin and his helper an hour and a half to finish reloading the product. During this time, the grates on the windows were open and the store was open for business. During the reloading process, Wood asked Tinlin to move his truck so that Wood could pull his car into a drive the truck was obstructing. Tinlin did so. When the reloading was complete, Tinlin returned to Busch. He could not make his empty pickups because the truck was full of rejected product.

Tinlin went to the office and was told by Supervisor Moriarity that Wood had called in and said he had tried to tell Tinlin that he had changed his mind, but that Tinlin had already left. Tinlin denied that Wood at any time came out and said he had changed his mind. Another team redelivered the load that afternoon. Tinlin testified that though he and Zuffante were paid for the delivery as if it had been made, they were not paid for the empty pickups which could not be made because of the refused shipment.[30] This would not have been the case if Busch considered the refusal to be the fault of its delivery team. According to Tinlin, he had a conversation with Moriarity about a week later and asked if Wood had cooled off. According to Tinlin, Wood was angry when he arrived at the store on May 7. Tinlin noted that Wood had lodged a complaint against him for blocking the sidewalk, the entrance to the store and the security grates. Moriarity told him that Tinlin had spoken with Sanchez about it. Wood also testified that a fellow employee had spoken with him on May 7, before he left to deliver the beer to Woody's. He claims the worker told him that Wood had warned the demonstrators on May 3 that he would get even with the next delivery. If this tale is true, it is hard to believe that Tinlin would unload before Wood arrived and accepted the load. Tinlin testified that he first spoke to Murphy about the incident on May 11 or 12, after the May 10 demonstration. He may have spoken to a steward about the matter before this.

I credit Wood's and Sokol's version of this incident and not that of Respondent's witnesses.

5. The May 10 demonstration

On May 10, at about 4 p.m., picketers appeared in front of Woody's. According to Murphy, this second demonstration at Woody's had a dual purpose. First it was a continuation of the ongoing boycott of Budweiser products and second it was in protest of Wood's actions on May 7.[31] There is very little evidence of any outward sign of the Union's second purpose. Murphy denied that anyone present for the Union urged customers not to patronize Woody's. The signs used were the same Budweasel and Boycott Bud signs used at previous demonstration. The leaflets were the same as used at the May 3 demonstration and make no mention of any dispute with Woody's. Murphy himself never communicated to Wood that the demonstration was in response to the May 7 events. Only some oblique taunts by picketers directed at Wood are the only indication that Wood was also a target of the demonstration. It is Murphy's position that none of the unlawful things alleged in the complaint about the demonstrations occurred and that he was present at the demonstrations to make sure they did not occur, pointing out that unlawful activities at the demonstrations was counterproductive to the Union's overall objectives in the boycott campaign.

After the demonstration started, Wood again called the police. The police responded and talked with Wood and Murphy. Murphy testified that after they left, in accordance with police instructions, the demonstrators marched in an ellipse in front of the store, displaying their signs. Wood complained that they turned right at the entrance of the store and their signs were over their shoulders, causing customers to have to dodge them to enter Woody's. Mahoney believed there were 30 or 40 picketers in front, counting the ones actively picketing and another

ruling, declined to issue complaint. The Union appealed this decision and the appeal was overruled.

[29] The Union does not represent the employees of this distributor.

[30] According to Tinlin, this would have amounted to about $20 or a little more. He did receive $170 for the refused load.

[31] In its answer, the Union stated that the May 10 demonstration was directed solely at Busch and the products it distributes. In a statement given in Federal Court, Murphy makes the same assertion. I do not credit Murphy's testimony in the instant case in this regard and accept the position taken in the answer and in Federal Court.

group standing across the street. Again there were picketers up the street at Sam Mcguires. Murphy testified that the maximum number of pickets actively picketing in front of the store on May 10 was 15. They would periodically switch places with those demonstrators across the street. I credit Wood's testimony that the marching demonstrators did interfere with customers trying to enter the store.

Wood testified that on this occasion he observed two of his customers drive up, slow down and then leave without coming in. Both of these individuals later told Wood they wanted to make a purchase but did not want to come in while the demonstration was going on. Mahoney and Wood testified that on May 3, they overheard some picketers urge customers not to go in the store and not to buy Bud. Sokol gave similar testimony, testifying he heard pickets ask customers not to buy from Woody's. Wood observed on two occasions a demonstrator reach and open a customer's bag to see what product the customer had purchased from Woody's. Both customers pulled back and tried to get away in these instances. I credit this testimony of Wood and Sokol.

One picketer, John Shea, yelled out when he saw John Wood, "Oh, Woody doesn't like his beer on the sidewalk," and then pretend to be a baby crying. Sokol also testified that he heard this and also heard this man keep saying, "[D]on't go in Woody's." This taunt referred to the May 7 beer delivery to Woody's discussed above. Wood testified that his customers on May 10 asked him what he had done (to cause the demonstration) and why the demonstrators were at the store again. After the demonstration, Woody's customers told Wood they would not enter the store during the demonstration. I credit Wood's testimony in this regard.

During the afternoon of the May 10, Sokol had to deliver three containers of Bud products to a customer. He walked out of the store with three, 30 packs of beer going to his car, which was parked in a lot on the right side of the store. He was prevented from using the sidewalk because the picketers were marching in a circle there. He walked in the street to the entrance of the lot, which was partially blocked by a large heavyset man. Sokol said excuse me, and the man did not move so he brushed past him and opened the gate to the lot. At this point, Sokol dropped the packs of beer, which broke apart. The heavyset man and some picketers started laughing and yelling weasel and scab and telling him he was making their job harder. Sokol returned to the store and told Wood he was going home. Wood assured Sokol they would not harm him and so Sokol again went to make a delivery. Sokol went to his car and opened the gate to the lot. The heavy set man was still there and did not want to move out of Sokol's way. Sokol gave the car gas and the man moved quickly.[32] I credit Sokol's testimony in this regard.

On the May 10, Mahoney parked his car, a 1985 Dodge 600 directly across the street from the store. During the day, picketers could be seen leaning against the drivers side of the care, as well as leaning on cars identified as belonging to picketers.[33] At no time, did any witness observe any picketer doing anything to Mahoney's car, except lean on it. The car was parked in this spot from 1 or 2 p.m. until he left work at 11 p.m.. Mahoney never asked Murphy or any other union supporter to have the men get away from his car. There is no clear showing that any one demonstrating that day knew the car belonged to Mahoney or any other Woody's employee. When he left work, he noticed two new dents in the rear drivers side of the car. Later, when he got home, he used a flashlight to better see the damage and at this time noticed someone had scratched the word, "wessel" in the paint on the drivers side of the car. According to Mahoney, this word was not scratched on the car before the May 10. Subsequently, at some point between May 10 and the date of this hearing on August 5, Mahoney got an estimate of the cost to repair his car, and without him knowing how or why, Busch officials came to see him about the estimate. At some point Busch officials took photographs of the damage to the car. Domesick indicated that though Mahoney told Wood about the damage on May 11, no mention of it is made in Wood's affidavit given to the Board about the picketing on May 10, on May 15.

With respect to both the damage to Mahoney's car and Sokol's car, I will not find a violation of the Act. No one testified that they saw anyone doing anything to these cars. They could have been damaged by union members or supporters. They could have been damaged by nonunion-affiliated vandals. In both cases, the damage was discovered some time after the demonstrators had left the area. Absent any real proof with respect to who caused the damage, I cannot find that it was at the hands of Respondent's members or supporters.

6. Respondent's demonstration at Woody's on May 3, 1996, violated Section 8(b)(4)(i) and (ii)(B) of the Act

Respondent's conduct during its demonstration at Woody's on May 3, 1996, shows that it had an unlawful object ab initio. This demonstration was a continuation of the sort of "in your face" confrontational conduct used by Respondent throughout its boycott campaign against Busch. As at Kappy's and the Pour House, the illegality of these tactics lies in the manner in which they coerce secondary persons.[34] The underlying legal principles and arguments establishing that Respondent's confrontational conduct at Woody's violated the Act have been previously described concerning the Pour House demonstration. Those principles are incorporated by reference here and will not be restated in detail.

The manner in which Respondent chose to conduct the demonstration was designed to be coercive of neutrals. The confrontational nature of Respondent's conduct demonstrates that

[32] R. Exh. 21a is a photograph taken by John Shea and shows the demonstrators in front of Woody's on May 10. Inter alia, it shows a large, heavyset man standing next to the entrance to the parking lot. Shea identified the man as a union demonstator.

[33] From a photograph in evidence, Curtis identified four of the six men leaning against Mahoney's car as Busch employees. Busch employee John Shea identified the sports utility vehicle parked behind Mahoney's car as his property.

[34] Unlike the Pour House, Respondent makes no claim that it lacks responsibility for any misconduct at Woody's. The only substantive difference between the two demonstrations is that John Murphy was not present at the Pour House. He admittedly was present at Woody's, yet took no action to control the misconduct occurring before his eyes.

at least one, if not the sole, object of the demonstration was to place pressure on Woody's, a neutral retailer. See generally *Abreen Corp. v. Laborers,* 709 F.2d 748, 754 (1st Cir. 1983), cert. denied sub. nom. *Massachusetts Laborers District Council Local 609 v. Abreen Corp.,* 464 U.S. 1040 (1984). The confrontational conduct at Woody's was a continuation of Respondent's boycott campaign strategy outlined in *The Labor Page*, as previously conducted in the group shopping excursions at Kappy's and other retailers and the publicity event at the Pour House. In each case, one object of Respondent's conduct has been to pressure secondary employers in Respondent's campaign against Busch.

The large numbers of pickets at Woody's and throughout the adjoining area were designed for maximum impact and maximum intimidation. The deliberate use of a "human billboard" of 15 pickets standing shoulder to shoulder along the length of Woody's sidewalk sent a clear message that customers and motorists should not pass to enter the store. Unlike a moving picket line, a "human billboard" creates a wall, offering no space for an individual to pass through. It is a visual and physical obstacle to be circumvented and, in that way, blocked access to the store. So intent was Murphy on maintaining this wall that he instructed his pickets to set up this billboard in the street when Woody's vehicle was briefly parked in front of the store. Murphy gave this instruction despite the fact that picket signs being held on the sidewalk were still visible to motorists over the roof of the parked vehicle. Obviously, Murphy felt the intimidating effect of his billboard was diluted by a car parked in front of it. He would not allow this to occur, however briefly. Once the billboard moved into the street, even parking in front of the store was impeded.

That Respondent had a secondary object in its demonstration is clearly evidenced through its oral appeals to customers not to shop at Woody's. These statements violate the Supreme Court's mandate in *Fruits & Vegetables,* supra, prohibiting a union engaged in consumer boycott picketing from requesting the public not to trade with the secondary employer. The oral appeals to customers at Woody's demonstrate the unlawful object of the picketing and are themselves in violation of Section 8(b)(4)(B). *Electrical Workers Local 11 (L. G. Electric Contractors),* 154 NLRB 766, 768 (1965).

Further, Respondent's conduct during the demonstration was designed to make it as difficult as possible for customers to shop at Woody's. Access to the premises was blocked in a variety of ways, beginning with the "human billboard." This conduct intimidated and impeded customers who wished to enter or park in front of Woody's. Jerry Myers impeded entry to Woody's by standing directly in the doorway to handbill, forcing customers to walk around him or ask him to move. Carmen Cecere picketed on the sidewalk, deliberately carrying his sign over his shoulder, rather than upright, and swinging it in the way of oncoming customers. All of this conduct, individually and in totality, was designed to make it difficult for customers to enter or shop at Woody's, thereby coercing them into taking their business elsewhere. The Board has held that attempting to block entry into a neutral building and making entry more difficult violates Section 8(b)(4)(ii)(B). *Service Employees Local 87 (Trinity Maintenance),* 312 NLRB 715, 725; 746; *Laborers Local 332 (C.D.G., Inc.),* 305 NLRB 298 (1991).

On at least three occasions, Respondent blocked and impeded vehicles attempting to park at Woody's. This conduct would necessarily coerce and discourage any potential customer from shopping at Woody's. It is a truism to note that, if customers have difficulty parking their vehicles, they will generally find another place to shop.

Respondent further engaged in direct confrontations with those customers who did shop Woody's. The pickets attempted to check the purchases of customers leaving Woody's by opening and attempting to open their shopping bags. Accompanied by statements such as "Make sure there is Miller Lite in there," this conduct is clearly coercive, constituting a physical confrontation of customers who crossed Respondent's picket line. While Respondent has a right to urge consumers not to purchase Busch products, it has no corollary right to verify that the consumers complied with their request. It is no coincidence that Respondent confined this conduct to female customers, assuming them to be more likely to bend to this coercion.

John Murphy contended that the only picket line conduct related to customer's bags occurred when he placed handbills in customers bags with their permission. This contention is belied by the testimony that pickets other than Murphy engaged in this conduct and that customers generally pulled their bags away and kept walking when confronted by a picket. Murphy's testimony does establish that he was present and aware of this misconduct when it occurred.

Most egregious is the conduct of one demonstrator who followed a customer into her car and checked her purchase while another demonstrator stood in front of her car blocking her exit. Such a trespass has an undeniable coercive effect. Each of the three Woody's employees present for the incident testified consistently concerning this event. A good deal of testimony concerned the identity of the man in the car and whether it was, in fact, Jerry Myers. Whether or not Myers is the actual perpetrator of this offense is not the ultimate issue. The fact remains that each of the three witnesses saw a demonstrator follow a woman into the passenger side of her car, inspect her purchase, which lay between them, appear to speak to her and leave her vehicle after 1–3 minutes. During this time, each witness saw another demonstrator standing in front of the car, holding a picket sign with a foot on the bumper preventing the woman's exit. She was, in effect, held hostage so that her purchase could be inspected. Each of the three witnesses gave virtually identical descriptions of the man in front of the car. Wood and Mahoney gave similar physical descriptions of the man in the car; Sokol was not asked for a detailed description. This testimony establishes conclusively that the incident occurred.

Respondent was wholly unable to show this incident did not occur. Respondent's initial defense, as shown in Murphy's two affidavits, was that the witnesses had mistaken picket Tony Pini visiting with a friend for a coercive incident. Pini destroyed Murphy's story by admitting he never entered anyone's car on May 3. Respondent thereafter carefully crafted its defense. Five of the 17 or more demonstrators present testified. Pini and Shea were not even asked about this incident. Cecere did not deny the incident occurred. Rather, Cecere responded to specific

questions, denying only that neither he nor anyone else in a Patriots hat stood on a car bumper. Cecere further described an innocent incident of a woman entering her *driver's* side door unaccompanied by any pickets. Only Murphy made a general denial that he saw any demonstrator enter a customer's car and as I noted earlier, Murphy had in the publicity events condoned confrontation behavior by his members. Respondent has failed to rebut the clear and convincing testimony of three witnesses describing this event. Rather, Respondent exerted much effort attempting to show that it was not Jerry Myers who entered the car. While this attempt was unsuccessful, even if the identification of Myers was erroneous, the facts still show that a demonstrator coerced a customer by entering her car uninvited to verify her purchase while another demonstrator blocked her exit, thereby violating Section 8(b)(4)(ii)(B).

Respondent did not confine its coercive conduct to customers, but unlawfully induced and encouraged Woody's employees to cease performing services for Woody's. It has been held that "the words 'induce or encourage' broad enough to include in them every form of influence or persuasion." *Electrical Workers Local 501 v. NLRB,* 341 U.S. 694, 701 (1951). The Board has found statements to neutrals such as "Anytime you cross a picket line, it is not right" to violate Section 8(b)(4)(i)(B). *Laborers Local 304 (Herring & Worley),* 282 NLRB 100, 103 (1986). Respondent's intent in such conduct is measured by the totality of the circumstances.*Electrcal Workers Local 501 v. NLRB,* 756 F.2d 888, 893 (D.C. Cir. 1985). The Board will measure Respondent's intent as much by the necessary and foreseeable consequences of its conduct as by its stated intent. *Mine Workers District 29 (New Beckley Mining Corp.),* 304 NLRB 71, 73 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992).

On May 3, Respondent on three occasions blocked Woody's employees attempting to park vehicles at the store. The pickets seemed quite aware, particularly as to Mahoney and Scott, that the drivers of the vehicles were employed by Woody's, thereby *establishin*g the 8(b)(4)(i) violation. Similarly, having observed Sokol working in the store, pickets admonished Sokol that he was making their jobs harder. This was a clear attempt to cause him to abandon his work and join their cause.

Similarly, pickets booing and saying scab as Woody's employees loaded Scott's truck with Busch products constituted an unlawful inducement to them to cease these labors in violation of Section 8(b)(4)(i)(B).

7. Respondent's demonstration at Woody's on May 10, 1996, violated Section 8(b)(4)(i) and (ii)(B) of the Act

Respondent engaged in a virtually identical display of coercive conduct towards customers and employees of Woody's on May 10 as it had on May 3. For the reasons previously described, Respondent's demonstration of May 10 also violated Section 8(b)(4)(i) and (ii)(B) of the Act ab initio.

Respondent picketed Woody's with even greater numbers on May 10. While initially creating another human billboard, on the orders of the police, the picketing resorted to a more traditional moving picket line shortly thereafter. This method continued to block Woody's entrance as pickets paused briefly at the entrance, forcing customers to go around them. As on May 3, Wood observed regular customers drive away without stopping and was later told by several customers that they had not come in because of the picketing. These comments validate the coercive effect of Respondent's picketing.

Respondent's pickets again appealed to customers on several occasions not to go into Woody's. They continued to check and attempt to check the purchases of those customers who did not heed these appeals. All of this conduct was coercive of Woody's and its customers in violation of Section 8(b)(4)(i) and (ii)(B). *Service Employees Local 87 (Trinity Maintenance),* supra; *Laborers Local 332 (C.D.G., Inc.),* supra.

Respondent's taunting of David Sokol, calling him "scab" and "weasel," as he was loading a car for a delivery, unlawfully coerced and induced Sokol to the extent that he told Wood he wanted to go home. The pickets' statements to Sokol that he was making their jobs harder similarly violated Section 8(b)(4)(i)(B). *Laborers Local 304 (Herring & Worley),* supra.

The totality of this conduct, as on May 3, demonstrates that an object of Respondent's demonstration was to pressure Woody's, a neutral retailer.

8. Respondent was not engaged in primary picketing at Woody's on May 10

Respondent concedes Woody's was a neutral on May 3. Respondent's claim that it was engaged, at least in part, in primary picketing at Woody's on May 10 is a late-contrived defense designed as a ruse to cover for its unlawful picketing. This defense was not raised during the investigation of the initial unfair labor practice charge, in Murphy's initial affidavit, or in its answer to the complaint in this matter. It was raised only in Murphy's second affidavit to the Federal court in defense of the 10(l) injunction proceeding. The court gave short shrift to Respondent's contention. ("Any argument that the primary interest on May 10 was to put pressure on Woody's because of the sidewalk incident is not supported by the evidence." (GC 57, p. 9.) I agree with the court.

The May 7 delivery incident was no more than a misunderstanding. There was no discussion of the May 3 demonstration or the Union by Wood or the Busch employees. There is nothing, in fact, to connect that incident with the May 3 demonstration. Wood had no reason to deliberately require two employees, who had not participated in the May 3 demonstration, to return beer which Wood had to accept that day to receive a substantial discount. It was not even established that the Busch employees were disadvantaged by the misunderstanding. It was not shown that it was more physically demanding for the drivers to reload their truck rather than to deliver to Woody's or that Wood believed that to be so. Tinlin and Zuffante actually received a full day's pay for working fewer hours, losing only about $20 in bottle returns, a fact unknown to Wood.

Murphy admittedly conducted no investigation of the incident before scheduling a second demonstration at Woody's. He did not speak to Tinlin or Zuffante. Rather, he seized upon this misunderstanding as a device to further pressure Woody's.

Respondent picketed on May 10 with the same signs and handbills as on May 3. It gave no outward sign to the public in its demonstration of any dispute with Woody's. Joseph Zuffante, who had been involved in the May 7 delivery incident,

participated in the May 10 demonstration. As to the purpose of the demonstration, Zuffante testified: "It's the standard picketing. It's all the same, boycott picketing, consumer picketing, I don't know how it's titled." (T. 1244.)

Respondent filed no unfair labor practice charge against Woody's until May 28, 1996, after Busch had filed its charge and after Respondent had been informed that complaint was issuing against it. (The complaint issued on May 30, 1996.)

Respondent, having no primary dispute with Woody's, had no legal right to pressure the neutral concerning a dispute regarding a delivery. The Union has no role in dealing with Busch's customers about such matters. Those dealings are conducted between the wholesaler (Busch) and customer (Woody's). Any complaints or issues which Respondent has concerning the working conditions of its members must be brought to Busch, not to neutral retailers. In particular, Respondent has no right to picket a neutral retailer concerning the retailer's treatment of employees during a delivery for Respondent has no primary dispute with the retailer concerning such treatment. Thus, when Shea and others admittedly chanted that Woody didn't like his beer on the sidewalk and engaged in other conduct specifically directed at Wood, they were unlawfully coercing him because of their dispute with Busch in violation of Section 8(b)(4)(i) and (ii)(B).

D. The 8(b)(3) Allegations

The consolidated complaint alleges that Respondent violated Section 8(b)(3) of the Act during contract negotiations. Specifically, the consolidated complaint raises the following issues.

a. Did Respondent violate Section 8(b)(3) of the Act by failing and refusing to provide the Employer with relevant and necessary information concerning Respondent's operation of an exclusive hiring hall?

b. Did Respondent violate Section 8(b)(3) of the Act by failing and refusing to provide the Employer with relevant and necessary information concerning Respondent's Health and Welfare Plan?

c. Did Respondent fail and refuse to meet with the Employer at reasonable times and for reasonable periods of time for the purposes of collective bargaining?

d. Did Respondent fail and refuse to bargain with the Employer by, inter alia, engaging in surface bargaining, engaging in dilatory, disruptive, and intransigent conduct at the bargaining table, making burdensome information requests of the Employer and by informing the Employer it would never get a collective-bargaining agreement from Respondent?

e. As a remedy for its unlawful conduct, should Respondent be ordered to pay the negotiation expenses incurred by the Charging Party in its negotiations with Respondent and the litigation expenses incurred by the General Counsel and the Charging Party in the litigation of this matter?

With the exception of some modification when deemed necessary and my views on the issue of requiring Respondent to pay expenses in this proceeding, I have adopted the brief of the General Counsel on the 8(b)(3) issues both as to the findings of fact and conclusions of law. I announced at the end of the hearing that this would be done.[35] There were virtually no crediblity issues with respect to these issues. I found Busch's primary witness on these issues, its General Manager Patrick Knipper to be totally credible and extremely knowledgeable on the factual matters relating to the 8(b)(3) issues. I found the bargaining notes of Busch to be the only reliable documentary evidence concerning the bargaining sessions. In day after day of cross-examination over the Busch notes and his independent recollection of what they covered, Knipper was never shown to have anything but a credible command of what had transpired during bargaining. The Respondent's notes of the sessions are incomplete and to whatever extent they might conflict with those of Busch, incorrect. Further, to the extent that one might find it necessary to make a credibility resolution between the testimony of Knipper and that of Murphy, I credit Knipper over Murphy in any such instance. Knipper was forthright in his answers and was perhaps the most honest and most intelligent witness I have ever heard. On the other hand, Murphy was often evasive and prone to giving unresponsive answers to questions.

1. The Employer's hiring hall information request

The Employer is a sales and distribution company servicing approximately 2500 retailers in the greater Boston area, providing them with Anheuser-Busch products, including Budweiser, Michelob, Busch, and others. The warehouse and delivery operation employees consist of drivers helpers, warehousemen and mechanics, represented by Respondent in what is known as the drivers unit.

Delivery routes are created each evening for the beer to be delivered the following day. The routes are created by a router, Edward Reardon, who is represented by Respondent. There are infinite variations in the daily delivery routes. The number of loads to be delivered, the size of the loads and the number of stops per load vary widely. Consequently, the number of drivers, helpers, and warehousemen needed daily varies widely. Busch uses spare drivers, helpers, and warehousemen daily to fill its need for employees.

The daily need for drivers, helpers, and warehousemen depends on how much beer is scheduled to be delivered that day and how many employees in each classification show up for work. Busch has no attendance policy. There is no requirement that employees show up for work, and no discipline is imposed for their failure to do so. Employees are also not required to notify Busch that they are not coming to work. Regular employees who do not come to work are known as "book offs."

Book offs fall into two categories. Some employees book off by simply not coming to work. Others may come to work, see what routes are available under the "pick bid" system, and

[35] As I find at a later point in this decision, virtually everything Respondent has done with respect to bargaining has been with the clear purpose of delay and that extends to this hearing. I have reviewed the transcript and notes before adopting the General Counsel's fact findings on the 8(b)(3) issues and believe it would be a further waste of judicial time to in effect retype a large number of pages of facts when there is no legitimate question as to their accuracy and truthfulness. I have adopted the General Counsel's legal analysis after review and believe it states the law as I know it.

chose not to work that day. There is no penalty on the employee for either type of book off. Under the "pick bid" system, drivers and helper pick their routes each day by seniority based on what is available.

Pursuant to article 2 of the 1991–1994 collective-bargaining agreement[36] covering the drivers unit, Busch is required to hire its spare employees through the union hiring hall.[37] The Union has operated an exclusive hiring hall for Busch's spare drivers, helpers, and warehousemen since before Pat Knipper's tenure with the Company.[38] To be qualified, spare drivers must have a commercial driver's license (CDL). Spare warehousemen must pass Busch's forklift-training course. There are no special requirements for spare helpers.

Respondent is solely responsible for supplying spare employees under the existing spare referral system, both in determining the number needed and determining who is referred. The number of spares needed daily is primarily determined by Respondent's chief shop steward, James Keegan. Other stewards, such as the night warehouse steward, may also contact the hiring hall when manpower is needed. On occasion, Busch contacts the hall directly when men are needed. Keegan begins the process the evening before delivery, when the number of loads to be delivered the next day is known. Keegan finalizes the number of required spares the next morning when the number of employees who appear for work becomes known. Spares may also be needed during afternoon and night shifts. Busch uses an average of 40 spares per day.

Respondent's hiring hall also supplies spare manpower to Metropolitan Distributing Company, the Miller beer distributor and Busch's chief competitor. Respondent supplies Metropolitan with drivers, helpers, and warehousemen, the same as it does to Busch. Respondent similarly supplied spares to Burke Distributing Corporation, Metropolitan's predecessor.

Busch is not aware of the identity of the spares who are being referred to it by Respondent before they appear for work. Busch is further not aware of the process used by Respondent in selecting and referring spares.

Spare drivers and warehousemen begin to arrive about 7 a.m. in the morning. While Busch has the right under the contract to reject, without cause, any spare referred by Respondent, as a practical matter it is unable to do so. By the time the spares arrive for work and Busch learns who they are, the beer is loaded and ready for delivery. To reject the spare at that point would cause a delay in delivery.

In the past few years, Busch has experienced significant problems with the spare referral system. Seldom do sufficient spares arrive at 7 a.m., requiring the chief steward to call the hiring hall and seek more. The lack of available spare employees has frequently resulted in delayed and rescheduled deliveries. Deliveries are scheduled with customers for a window period during which Busch promises to deliver and the customer knows it will need employees to receive the delivery. In the first 6 months of 1996, over 600 truck loads had to be rescheduled. At an average of 12 stops per truck, that calculates to about 7000 deliveries not made as scheduled. About 50–60 truck loads had to be delayed until the next day, meaning the customer did not get delivery at either the time or date requested. Such rescheduling also creates a significant administrative burden on Busch in communicating with customers, requiring as many as 12–15 phone calls per delayed vehicle. Such delays often result in lost sales. This has adversely impacted Busch's ability to provide quality customer service. In addition to delayed deliveries, Busch was not satisfied with the quality of these spare employees.

The most significant incident concerning an insufficiency of spare employees occurred on Friday, July 3, 1992, the day before a holiday weekend. Busch had a tremendous amount of beer to be delivered and was told that the hall was out of men at 8 a.m., when 40 loads remained unmanned. Busch was unable to reach John Murphy and received no callbacks from the hiring hall. About 3 p.m., individuals who were members of a furniture movers' local union began appearing for work.

Busch has encountered additional problems with spare employees from the hall, including difficulties with supervisors and additional customer complaints. Busch is concerned that Respondent's hiring hall is not operating on a nondiscriminatory basis, since about 99 percent of the referrals are white males of Irish or Italian extraction. As an employer, Busch is trying to expand the use of women and minorities in these positions.

Busch is also unaware of the system by which Respondent decides to refer spares to each of its two accounts, Busch and Metropolitan. In the context of a labor dispute, in particular, Busch is concerned that it is not getting the best employees. Busch was further concerned that only spares who participated in Respondent's boycott activities against it were being referred from the hall. This belief was formed, in part, by comments of William Barry, a former president of Respondent.

Sometime in 1995, Pat Knipper was standing in front of the Fleet Center on Causeway Street in Boston with William Barry during one of Respondent's boycott demonstrations against Busch. While they were discussing the labor dispute, an individual came up to Barry and asked what he wanted him to do. Barry asked him if he had seen John Murphy yet and the man said no. Barry told the man, who was evidently a spare employee, to find Murphy because if his name does not go on the check list, he would not work the next week.[39]

Pat Knipper had discussed the problems with the hiring hall with John Murphy on a number of occasions. Murphy has admitted to Knipper he has difficulty in obtaining a sufficient number of qualified drivers with CDLs, which are required by the Department of Transportation to drive Busch's trucks.

Under the 1991–1994 contract, spare employees become regular employees if they work 90 out of 120 days in a rolling

[36] Art. 2(1)(a) reads: "The Employer shall call the Union whenever additional help is needed. However, in the event the Union is unable to provide needed help, the Employer may hire on a temporary basis from other sources, in accordance with this Agreement."

[37] While Respondent's counsel contended in his opening statement that Respondent did not operate an exclusive hiring hall, no evidence was produced to support this unwarranted claim.

[38] There is no hiring hall provision in the plant unit.

[39] Barry was not called by Respondent to rebut this testimony.

period.[40] In effect, this precludes Busch from determining who its regular employees will be, since it is Respondent, in the first instance, who determines who is referred to Busch for those 90 out of 120 days.

These problems caused Busch to determine that it wished to hire its own spare employees. Busch thus proposed, in its initial proposals to Respondent, to eliminate its exclusive reliance upon the hiring hall for spare employees, allowing it to hire the best qualified employees, be they from Respondent or elsewhere. Busch further proposed increasing the period for spares to become regulars to working 120 out of a rolling 150 days. Busch also proposed eliminating that provision of the contract which called for Respondent to verify the I-9 forms of prospective spare employees.

In its initial proposals to Busch on October 13, 1994, Respondent also proposed a change in the conversion formula for spares to become regulars. Respondent's proposal would have retroactively made regulars out of spares who had averaged 1040 hours of work annually beginning in 1992.

By letter dated November 14, 1994, Busch made a 26-item request for information of Respondent concerning its operation of the exclusive hiring hall. The request was made so that Busch could assess its proposals concerning the operation of the referral system, so that Busch could assess Respondent's proposal concerning changing the criteria for spares to become regulars, and for the general purpose of administering the contract.[41]

Respondent replied by letter dated November 22, 1994, from its attorney, Stephen Domesick, to Busch's chief negotiator, Eric Schmitz (the "first response."). Respondent made a specific response in denying each numbered request, but no documents were provided. The nature of each of these responses will be discussed below.

Schmitz replied by letter of December 12, 1994, noting, inter alia, "Your responses are inadequate and incomplete." Domesick responded by letter of December 15, 1994, contending that the Union had responded to each request by providing the data or an explanation as to why it could not.

On November 2, 1995, fully a year later, Busch's chief negotiator, Arthur Telegen, who had replaced Schmitz, sent Domesick a letter further explaining the Employer's need to change the hiring hall system through negotiations and soliciting proposals from Respondent on this issue. The letter noted, at paragraph 4, that Respondent's refusal to provide the requested hiring hall information had "disabled the Company from assessing any continued involvement with the Union hiring hall."

Domesick responded by letter of November 9, 1995 (the second response).[42] In its second response, Respondent restated or revised its answers of a year earlier, to be discussed below. No documents or materials were included with the second response.

Telegen responded by letter dated November 27, 1995, disputing that Respondent had supplied any meaningful responses to the November 1994 information request and suggesting that the second response was motivated by a desire to influence the upcoming unfair labor practice trial scheduled complaint alleging Respondent's unlawful failure to supply the requested information.[43] The letter further discusses certain of Domesick's responses to questions concerning the hiring hall made during negotiations, to be discussed below.

On April 19, 1996, Domesick sent another letter to Telegen purporting to respond to the initial information request (the third response). An examination of the substantive responses of the third response shows it to be identical to the second response and, thus, it will not be referred to hereafter.

The third response closes by stating:

> With respect to the information which the Union possesses and which has not yet been supplied, please contact my office so that arrangements may be made for a representative of the Employer to review the records and make the calculations and analyses of the raw data maintained by the Union.

The letter did not disclose what information Respondent was now admitting to possess, did not explain why it was previously withheld and did not explain the "calculations and analyses" to which it refers.

By letter of May 15, 1996, Busch Attorney Caryn Fine requested Respondent immediately copy and forward to Busch all of the documents to which it referred in its April 19, 1995 letter.

Respondent made no further response until a letter dated September 18,1996, almost 2 years after the request and just before the scheduled trial of this matter on October 1, 1996. Domesick offered in this letter to allow an Employer representative into the Union's office 3 days per week for 1 hour each day with access to the raw data in order to make calculations concerning Busch's requests 6, 8, 9, 10, 12, 13, and 14.

Telegen responded by letter of September 24, 1996. Telegen stated that Domesick's September 18 letter was the first response he had where Respondent offered access to records and, in order to assess the bona fides of the proposal, asked for a description of the raw data, the volume of the raw data and a sample.

Domesick responded on September 24, 1996, reiterating his offer of 3 hours per week to inspect records. Domesick for the

[40] Regular employees receive an additional $2 per hour as well as fringe benefits, which spares do not receive.

[41] During Respondent's boycott against Burke Distributing, Burke had made a similar information request of Respondent concerning its operation of the hiring hall. Respondent had refused to supply the information resulting in the issuance of a complaint against Respondent by the General Counsel. Though the matter ultimately settled, it does not appear that Respondent was required to provide the information. It is undisputed that Busch was aware of the Burke request and incorporated some of those requested items in its own request.

[42] Respondent chose to respond to these requests with a complicated system of answering questions by referencing, without restating, one or more prior responses and, on occasion, adding additional information. This method of responding was evidently designed by Respondent to make it more difficult for Busch to determine Respondent's responses to any particular question. Such a calculated response is arguably evidence of bad faith in responding to the information request.

[43] At that time, the trial on this matter was scheduled for December 11, 1995.

first time described the raw data as consisting of calendar year forms for each employee and enclosing a sample blank form. Domesick further contended that Busch had demanded in its information request that Respondent make a variety of calculations from raw data concerning over 200 registrants for a 3-year period.

Telegen responded by fax on October 9, 1996, disputing Domesick's claim that he had offered to provide access to certain information in April 1996. Telegen referred to Fine's May 15, 1996 response to Domesick requesting production of any documents, to which Domesick did not respond. Telegen further denied that Domesick's offer of 3 hours or inspection per week, made on the eve of trial, was a legitimate offer. Telegen termed Domesick's continuing referral to the company's request for "calculations" as "incomprehensible." Telegen again requested copies of Respondent's records, offering to pay any reasonable photocopying costs or, in the alternative, make copies of the records supplied by Respondent.

Domesick responded by letter of October 11, 1996. In reference to Telegen's letter, Domesick simply stated, "I have submitted your reply to my client for review."

Respondent made no further response to the information request. There has been no further communication between the parties concerning the information request. Respondent has produced no documents or materials pursuant to the request.

The specific relevance of each requested item, and Respondent's various responses, will be discussed below. The subject of Respondent's operation of the hiring hall was further discussed on various occasions during negotiations. Those discussions will be detailed below.

a. Items 1 and 2

In these requests, Busch sought copies of all of Respondent's practices and policies concerning the eligibility of employees for referral from the hall and Respondent's policies regarding the dispatching of spare employees. This information was necessary to determine if Respondent had established some eligibility criteria which would explain its admitted difficulty in providing spare employees to Busch. The information regarding dispatching of spares related to the administration of the contract as well as to the proposals to change the referral system. It further related to Busch's concerns about the hiring hall, specifically as to how Respondent allocated spares between the competing referral of Busch and Metropolitan. Busch was concerned that there could be a policy, for instance, to satisfy Metropolitan's needs first or that they get the best referrals. This information would relate to Busch's proposals to change the referral system.

In its first response, Respondent stated, as to both items 1 and 2, "There are no such practices or policies copies of which exist." Knipper found this response inadequate, noting it was simply not logical to believe that Respondent did not have some sort of system for selecting spares to be referred.

In its second response as to items 1 and 2, Respondent stated, "The Union possesses no materials responsive to this request." Knipper found this inadequate for the same reasons. While Knipper admitted that the request did not specifically seek any "unwritten" policies, he felt it was implicit in the request and made clear in Fine's letter of November 27, 1995, which states, "The Company continues to seek, but the Union continues to refuse to provide, useful records and *information* on the operation of the Union's hiring hall." (Emphasis added.) As Knipper stated: "I think if you were operating in good faith, you would have taken that to be that we are looking for information about the operation of the hiring hall." Knipper further believed that Respondent was legally required to keep written records of its referral policies. No substantive information or records responsive to this request were ever produced by Respondent.

b. Items 3–5

These requests concerned any financial charges imposed on hiring hall referrals by Respondent. Specifically, Busch sought any charges and the amount charged employees for utilizing Respondent's referral service, copies of any policies or practices in that regard and any charges or fees, with the amount, imposed on nonmembers of Respondent for utilizing the hall. If no fees were charged, it asked for the portion of union dues used for the referral service.

This information was requested to determine if fees charged by Respondent might be responsible for its difficulty in obtaining qualified employees. Since a CDL is a valuable commodity, Busch was concerned that the inefficiency in the hiring hall in dispatching qualified spares might be due to charging an excessive referral fee for work referrals. Additionally, Respondent has told Busch that its hiring hall is a money-making operation, further supporting Busch's concern that such fees could relate to the insufficiency of referrals. Further, Busch had heard rumors that there were different levels of fees, with lesser ones being imposed on members.

Respondent's initial response to each of these items was that the information was confidential, related to the internal operation of the union and irrelevant to a mandatory topic of bargaining (herein collectively called the confidentiality defense). Schmitz responded claiming these defenses were not well founded and the Respondent's own statements during negotiations concerning its operation of the hiring hall further supported the demand for information.

In its second response a year later, Respondent repeated its initial response, but added that persons referred are expected to pay a referral fee, though the union had no policies or practices on such fees, and that no registration fee is charged to utilize the hall. No further information or explanations were provided. Respondent never explained the distinction, if any, between administrative fees and registration fee.

Respondent provided no evidence at trial to support its claims of confidentiality or irrelevance concerning this requested information, or any of the other requests, discussed below, where this defense was raised.

Busch found these responses inadequate as they did not provide the information to allow them to evaluate their concern about the hiring hall. In particular, Knipper found it hard to believe that Respondent charges fees, but has no policy concerning charging fees. No additional information was ever provided.

c. Items 6–11

In items 6-11, Busch sought information concerning individuals referred out of Respondent's hiring hall. Item 6 sought a listing, by name, for each working day of all spares available to be referred. Knipper felt that the term "available" as used in the request was self-explanatory, meaning that the individual had indicated to the hiring hall that they were available for work as a source of manpower on a given day. Knipper did not see how Respondent could know who to call for work if it did not have a list of who was available. This request was relevant to the issue of the insufficient numbers of employees referred from the hall. A listing of the numbers available, with their names, would allow Busch to determine whether manpower shortages or other reasons were responsible for the problems and to address the issue with Respondent. The list of names would allow Busch to determine whether it was receiving the best available spares. This information would allow them to assess their proposal to eliminate the exclusive reliance on hall for hiring spare employees.

Item 7 sought the same information as item 6, but broken down by the categories of employees referred-drivers, helpers and warehousemen. This relates to the issue of obtaining drivers, in particular, from the hiring hall. A listing by classification would allow Busch to determine if the problem was improving or deteriorating. Knipper believed that Respondent must maintain information by classification since it refers spares by classification.

Item 8 sought a listing, for all those listed in item 6, of days worked compared with days where they were available and not dispatched. This information would address Busch's concern about the reliability of the hiring hall, that there may be spares available on a given day who are not being referred to it.

Item 9 seeks a listing by date of all employees dispatched by Respondent to Busch. The term "dispatch" is used by Respondent in the operation of its hall, referring to informing an employee there is work available at Busch and sending him there. That an employee was "dispatched" does not mean he appeared for work at Busch. This information was uniquely in the possession of Respondent and would go to the reliability of the employee. Such information would be relevant in light of the existing system of automatically converting spares to regulars based on days worked and the proposed changes in that system.

Item 10 sought a listing by name and day of all employees dispatched to the Miller distributorship, be it Burke or Metropolitan. This request related to Busch's desire to have the best qualified employees referred to it and would allow them to assess whether that was occurring in comparison to who was being referred to the Miller distributor. Busch also wanted to assess how Respondent distributed employees between it and Miller on days there were shortages.

Item 11 sought a listing by name and date of any employees referred to the hiring hall for any employers other than Busch and the Miller distributor. This information would be relevant for the same reasons as item 10.

Respondent's initial response to items 6-11 was identical. In each case, it raised the confidentiality defense and, further, contended that each request was overbroad, vague, and sought information regarding spare employees' "availability," which was not determinable by the Union (the overbreadth defense).

For the reasons stated above, Busch did not find any of those defenses to be sufficient, particularly the claim of not understanding "availability."

A year later, Respondent offered an additional response. As to item 6, it contended Busch had not shown relevance for the requested information.

As to item 7, Respondent offered that only those possessing CDLs were available for referral as drivers. To Knipper, this response was only common sense, but nonresponsive as it still did not give the list of names Busch was seeking.

As to item 8, Respondent claimed Busch was seeking a daily "comparison" for 1000 workdays, and it contended Busch already had this information and, in fact, had provided it to Respondent pursuant to Respondent's information request of Busch. Busch, however, had information as to who had *worked* for it, but not who was *available* to be referred by Respondent.

As to item 9, Respondent contended Busch already had the information as to who was dispatched and had supplied it to Respondent. Busch, however, only had information on who it employed, not who Respondent dispatched.

As to item 10, Respondent claimed Busch had not advanced any reason of relevance for the request. Further, it contended that Burke was out of business and that Metropolitan had advised Respondent not to divulge its information to Busch. Respondent offered no evidence or testimony whatsoever to support this latter claim. Knipper testified that he had spoken to the general manager at Metropolitan, Brian Walsh, who stated he had made no such request of Respondent.

As to item 11, Respondent stated, for the first time, that it referred employees to no employers other than Busch and Metropolitan and, thus, there was no data to supply. Respondent offered no explanation as to why it could not have given this answer a year earlier.

On September 18 and 24, 1996, almost 2 years after the initial request, Respondent states that it possesses information responsive to items 6, 8, 9, and 10 (as well as 12, 13, and 14), enclosing a blank calendar page to demonstrate the manner in which the information is kept for each of the 200 registrants. As described above, Respondent offered to make these documents available for inspection 3 hours per week, but never responded to Busch's request for copies of the documents.

Busch never received the data requested in items 6–10.

d. Item 12–13

In item 12, Busch sought a listing of the specific dates Respondent was unable to fill the requested number of spares since December 1991, along with the reason for each such failure. Item 13 sought the same information concerning the Miller distributorship. This request related to the efficiency and reliability of the hall and "would sharpen [Busch's] focus as to what the issues are with not getting enough people." (T. 1688.) The information in item 13, compared with item 12, would allow Busch to determine if they were being treated fairly in referrals from the hall.

In its first response, Respondent contended that the request was not relevant because Busch has never asserted that Re-

spondent was unable to fill the requested number of spares. This response was simply untrue, as Knipper and Murphy had discussed the problem a number of times during the term of the contract and it had also been discussed "fairly extensively" during the first couple of meetings.[44]

Respondent's second response, a year later, contended that Busch had advanced no relevance for the request and already knew the dates when it did not receive all the referrals it requested. Further, it contended that Respondent did not maintain the reasons, but added that they included insufficient notice from the Employer, no available CDL-licensed referrals and the unwillingness of a referral to work. Respondent offered no explanation as to why it had not offered this information earlier. As to item 13, Respondent contended that it maintained no records of reasons for shortfalls, and that the "Union had been advised not to disclose such business-sensitive data to AAB." Respondent offered no evidence whatsoever of such a claim being made, or by who. Brian Walsh, general manager of Metropolitan, told Knipper he made no such request.

e. Item 15

In item 15, Busch asked for a listing of the hours of business for Respondent's dispatching function and all telephone numbers. This was relevant so that Busch could determine the adequacy of the hiring hall operation. Busch required the hall to operate 16–17 hours daily. Busch is only aware of the Union's main number for the hiring hall. When calling it, Busch has reached both an answering machine and an answering service, leading it to believe there must be other ways of contacting the hall.

The Union's initial response gave only the Union's main phone number, did not discuss whether there were other numbers and did not reveal the hall's hours of operation.

The second response, a year later, reiterated the phone number and gave the hall's hours of operations. Busch continues to believe that there are additional phone numbers, particularly because of the July 3, 1992 incident when Busch was unable to contact Murphy about the manpower shortfall, but the chief steward was able to reach him.

f. Item 16

In Item 16, Busch requested a designation, by name, as to who from the hiring hall calls Busch and spare employees regarding availability. Busch was concerned regarding the efficiency of the hall. Knowing the number of daily calls required to obtain spares, the extended hours over which those calls were made and John Murphy's busy schedule, which frequently requires him to be out of town, Busch believed that others besides Murphy must be involved in the making of those calls and the selection process of spares. An insufficient number of individuals to make those calls could explain the hall's inability to meet manpower needs. On the other hand, if individuals affiliated with the Miller distributor were making calls, Busch was concerned that they might favor Miller over Busch in the selection of spares.

[44] While Murphy was called to testify by Respondent, he did not rebut these contentions.

Respondent did not directly answer this question. Rather, in its first response, Respondent, claimed the request was unclear and stated: "The Union's principal officer is responsible, directly or indirectly, for contacting 'spare employee.' John F. Murphy is the Union's principal officer." Respondent reiterated this answer in its second response.

Busch did not find this answer responsive, as it did not identify individuals, only the responsible official. As to the claimed lack of clarity, Busch felt the request was self-explanatory.

g. Item 17

In Item 17, Busch asked for a statement as to whether Respondent was accepting applications for additions to the spare listings by classifications, and, if so, whether the number was limited. Busch wanted to determine, in light of the demonstrated inability of the hiring hall to provide sufficient spares, whether it was accepting applications to improve that situation.

In its initial answer, Respondent stated: "In accordance with law, the Union neither discriminated nor prohibits any individuals from applying for referrals." In its second response a year later, Respondent added: "A person over the age of 18 (as required by the Massachusetts Alcohol Beverage Control Commission) and a properly documented resident alien may submit application for referral."

Busch considered this answer to be "fencing" with them by Respondent. Busch had asked a simple question requiring a simple answer, which Respondent refused to give. Even when Domesick was asked by Knipper directly during his testimony whether Respondent was accepting applications, Domesick declined to answer. Respondent, typically, preferred to answer such a direct question obliquely, requiring substantial interpretation.

h. Item 18

Item 18 requested a copy of the application used by Respondent to consider applicants for spares, including for DOT and CDL qualified drivers. Busch wanted this information to determine what types of qualifications or experience level Respondent sought for these positions. Busch, which is ultimately responsible for those it employs, wished to make sure Respondent was following the proper legal guidelines in its selection and, further, to determine if there was anything on the application which could be causing the hall to have insufficient referrals.

Respondent's initial response refused to provide the application, raising the confidentiality defense. Respondent never explained these defenses to Busch. In its second response, a year later, Respondent stated simply: "The application can be provided." This response was restated 5 months later on April 19, 1996. Curiously, despite those assurances, Respondent has *never* provided Busch with the application, even after the issue was raised at trial.

i. Item 19

In item 19, Busch requested a copy of the completed application for each employee listed in item 6, the request for a list of all employees available to be dispatched since December 1991. This information was needed to verify the qualifications and experience of those available in the hall, to satisfy Busch that

the referrals were qualified to be its employees and to determine the efficiency of the hall. The applications could further assure Busch that it was receiving the best qualified employees from the hall and that the hall was not discriminating regarding referrals, discrimination for which Busch could be held liable. Thus, this request specifically raised issues of administration of the collective-bargaining agreement.

In its initial response, Respondent raised the confidentiality defense, but never explained the basis for it to Busch.

In its second response, Respondent simply stated that Busch had never advanced any reason why this information was relevant. Busch contended this was false, as it had explained a number of times, before and during negotiations, that the qualifications and experience of its employees were important to it.

j. Items 20 and 21

In item 20, Busch asked for copies of Respondent's policies and practices regarding nondiscriminatory treatment of spares, specifically asking for explanations of practices if no policies exist. Item 21 asked whether Respondent participated in an affirmative action program regarding the hiring or referral of spare employees, requesting a copy of such program if in writing and an explanation of its practice if not. These requests related to the issue of insufficient qualified employees in the hiring hall, whether Respondent was treating spares in a nondiscriminatory manner, as well as whether Respondent was attempting to attract minorities and women. Further, an EEOC audit in 1992 or 1993 had found Busch to be underutilizing minorities in these job categories, causing Busch concern regarding its hiring and referral practices.

Respondent's initial response to each item was simply to list a number of federal antidiscrimination statues without further explanation. In its second response to item 20, a year later, Respondent stated that it verified applicant to be 18 years of age, but had no other information responsive to the request, providing no explanation as to its nondiscrimination practices. Busch considered this a nonanswer. In its second response to item 21, Respondent added that, while it does not discriminate, it does not participate in any affirmative action program, then restated the Federal nondiscrimination statues described above. Busch did not know whether this latest answer was true, and Respondent never explained why it waited a year to provide it. Respondent continued to fail and refuse to describe its nondiscrimination practices.

k. Item 22

Item 22 requested the names of all spares, previously identified in paragraph 6, who were DOT and CDL qualified. This list would allow Busch to determine if the individuals had become qualified over time and if the hall was actively trying to increase the number of qualified drivers.

Respondent's initial reply raised the confidentiality and overbreadth defense. Respondent's second response, a year later, Respondent asserted that Busch had never advanced a reason why the information was relevant, adding that only CDL-licensed drivers may be referred as drivers and that Busch is required to maintain records showing drivers' qualifications. Respondent never explained to Busch the defenses in its first answer. As previously described, it is untrue that Busch had not explained to Respondent its problems and issues with the hiring hall not fulfilling its manpower needs. Moreover, Busch is fully aware that drivers need a CDL and that it must document that fact.

l. Item 23

Item 23 requested a copy of Respondent's random drug testing program pursuant to its agreement with Busch of January 27, 1993. Department of Transportation (DOT) regulations mandate drug testing for all CDL licensed drivers, including spare drivers. In an agreement dated January 27, 1993, Respondent and Busch had agreed that Respondent would perform the mandatory drug testing for spare employees and would establish a program to that effect.[45] Busch understood that DOT regulations required such a program to be in writing. This understanding arose from the regulations[46] and from a service interpreting those regulations to which Busch subscribed.[47] Busch retained the ultimate liability if Respondent failed to comply with law and regulations in administering its drug testing program.[48] Busch is also required to have a copy of the program in case of a DOT inspection. Thus, Busch requested this information in order to verify Respondent was properly carrying out its contractually agreed upon responsibilities.

Respondent's initial reply was that it possessed no practices or policies "copies of which exist," except to the extent that Busch "had already been provided with written evidence of the Union's drug testing program." Busch assumed this answer referred to a series of invoices it had received for drug tests performed on spare employees.

In its second response, Respondent claimed that Federal regulations did not provide for disclosure of medically sensitive data, that Busch had not obtained releases from employees involved and had never explained the relevance of the information. The latter contention is simply not true, having been discussed at negotiations several times. Moreover, Busch was clearly not seeking any individual's medical data by this request, only a copy of the program itself. At no time did Respondent provide a copy, or an explanation, of its program to Busch.[49]

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[45] Par. 13 reads: "Spare drivers furnished by the Union shall be tested under *its controlled substances random testing program for spare employees* subject to the applicable federal regulations in 49 CFR §§ 109 and 111 and those regulations referred to therein." (Emphasis added.)

[46] Par. 13 reads: "Spare drivers furnished by the Union shall be tested under *its controlled substances random testing program for spare employees* subject to the applicable federal regulations in 49 CFR §§ 109 and 111 and those regulations referred to therein." (Emphasis added.)

[47] See GC 60 at Interpretations-5, Question 12, describing documentation required to be maintained.

[48] GC 61 concludes: "It is the employer, not the C/TPA, who must answer to DOT for noncompliance with DOT requirements if the employer's C/TPA does not properly carry out the requirements of DOT rules."

[49] While Respondent's counsel stated that John Murphy would testify to explain these answers, Murphy was never questioned concerning them. Counsel's representations can be accorded no evidentiary weight.

m. Item 24

In this item, Busch sought a list of the number of random drug tests conducted by Respondent, the dates of the tests and numbers of individuals tested on each date from January 1993 to the present. This information was needed to verify that Respondent was testing according to DOT regulations. The regulations require that 50 percent of the appropriate pool be tested and that such tests be reasonably spread throughout the year. The request did not seek the identity of any individual tested or the results of any test.

Respondent's initial response repeated its response to item 23 and also raised the confidentiality defense. In its second response, a year later, Respondent claimed Federal regulations did not provide for disclosure of the information and Busch had advanced no reasons for its disclosure.

Busch believed this response to be untrue because the DOT required the records sought to be maintained, as described in GC 60 and 61. There are no regulations which preclude disclosure of this information. Further, the drug test invoices did not disclose the information sought, including the numbers of tests conducted.

n. Item 25

In Item 25, Busch requested Respondent to list all documentation and other information it maintained to satisfy DOT requirements. The request did not ask for the production of the information itself. The Department of Transportation requires some 15–17 different items which must be maintained as part of a drug testing program. These items must be maintained by the Employer, who has ultimate liability, or be available to the Employer within 48 hours. The list includes items such as who is in the pool, how employees are added or deleted from the pool and the numbers of positive and negative tests during the year. Busch requested this list to verify that Respondent was maintaining the proper information.

Respondent's initial response claimed the request was unclear, but that it maintained all information required by law. It did not provide a list of the information maintained. In its second response, Respondent contended that Busch maintained these documents, including DOT physical examination forms and cards. Of course, since Respondent was conducting the drug testing per the contract, only Respondent would maintain that information. Respondent never provided such a list.

o. Item 26

In item 26, Busch requested Respondent provide it with verification of employment documents, including I-9 forms, for each employee available for referral through the hiring hall. In a side letter to the collective-bargaining agreement dated January 4, 1989, Respondent had agreed to undertake the federally mandated verification of employment eligibility, which included I-9 forms. Busch had proposed to delete this requirement as part of its initial proposals. In this request, in order to assess its proposal and administer the contract, Busch sought production of the documents Respondent had agreed to verify.

Respondent's initial response was to raise the confidentiality defense. In its second response, it stated that the Department of Labor had audited its verification of employment data, Federal regulations did not provide for its disclosure and Busch had not shown relevance. No information was ever provided.

Busch was aware that the Department of Labor had done a random sample of Respondent's records 2 years earlier. Busch had never received the I-9s or names of the employees involved and had not verified the information itself. Busch, further, wished to verify the current information. Respondent refused to allow it to do so.

2. Discussions of the information request during negotiations

Busch attempted to discuss with Respondent its hiring hall operation during collective-bargaining negotiations, before and after its hiring hall information request on November 14, 1994. During these discussions, Respondent continued to refuse to provide Busch with information concerning the operation of its hiring hall.

In the drivers' meeting of November 3, 1994, prior to its information request, Eric Schmitz described the problems Busch had experienced with the hiring hall, including not receiving sufficient spares and not receiving the spares it prefers. Schmitz explained how, as a practical matter, Busch had to accept spares referred by the Union in order to get the trucks out. Pat Knipper described an incident on the July 4, 1992 weekend where Respondent had no spares and referred 50 furniture workers, resulting in customer complaints. In response, Domesick stated that the hall preselected spares, doing background checks and taking care of IRCA matters. Domesick suggested, but did not propose, that the hiring hall should act as a business and charge Busch for each spare referred.

An extensive discussion occurred at the March 21, 1995 drivers' session, during which Schmitz persistently asked Domesick to explain how the hiring hall operated, a question summarizing items 1 and 2 of Busch's information request. Schmitz received a series of nonresponsive, rather bizarre, analogies in response. Domesick stated:

> Why do you need to know? . . . It's like electricity. I know I turn a switch and there's light. That's all you need to do. You make a phone call and the employees are there. It's law and sausage. That's all you need to know. Turn on a switch. . . It's a magic black box. . . . It's like a computer. You turn it on and there it is. . . . It's like a computer. All you need to know is what you need to turn it on and make it type and that's it . . . . If I type on it, it works. I don't need to know cobal. . . . It's a computer.

Domesick thereafter continued to parry questions concerning how Respondent selected and referred spares. When asked in what order spares are called, he responded: "I don't know. It could be no order. It could be on a rotation. It could be random. It's irrelevant." When pressed further, Domesick told Busch to assume spares were called by rotation, then stated: "Do you want to meddle in our affairs? Do you want to break down negotiations on how we send you spares?" Domesick continued to parry questions about spare selection with non-responsive answers, including again analogizing the system to electricity. When Schmitz asked why Domesick would not answer his questions concerning the hiring hall, Domesick stated, "It's none of your damn business!"

At the drivers' session of October 24, 1995, a year into the negotiations, in response to a question (see items 3–5 of the information request), Domesick admitted for the first time that referrals are charged an "administrative fee," though the definition and amount of that fee were not disclosed. Domesick further responded, for the first time, that referrals were selected on a "nondiscriminatory and rotating basis," but refused to respond when asked if all spares got an equal chance at referral (see items 2 and 20 of request). Domesick thereafter indicated that Respondent would answer Busch's information request if Busch withdrew its proposal to eliminate the exclusivity of the hiring hall. When Arthur Telegen asked Domesick specifically to provide a list of those referred and the basis of referral (see items 1, 2, and 6–11), Domesick stated:

> You're asking for sources of our information. It's our business and it's confidential. We keep it from you and your competitors. It's proprietary and private business information. . . . Under EEO we are a referring service for money. Since we represent employees and comply with requests of you and your chief competitors, we have to keep it confidential. . . . For three years we resisted your competitors' request for this information and we will continue to do that. It's confidential business information.

The latter point was in apparent reference to Burke's request for similar hiring hall information, which was the subject of a prior complaint before the Board.

Thereafter, in this same meeting, Domesick refused to answer questions concerning how much the hiring hall charged employees, how the hiring hall qualified employees, whether the hiring hall trained employees, and how much money the hiring hall derived annually from referrals.

On November 16, 1995, Domesick repeated that Respondent charged an "administrative fee," not a referral fee, but refused to disclose the fee or when it is imposed.

On January 19, 1996, a discussion occurred concerning Respondent's performance of drug testing on spares. Domesick refused to disclose the number of tests Respondent performed, how spares were selected for testing and whether or not Respondent had a written drug testing policy (see items 23 and 24). When Busch contended that DOT required testing to be done at four times during the year, Domesick stated Respondent tested only in December because, in that way, employees are "on pins and needles for the maximum period of time." Telegen stated that such testing was unacceptable to Busch (GC 38(ag), pp. 6–7).

3. Respondent violated Section 8(b)(3) of the Act by refusing to provide the requested hiring hall information

An employer has a duty to provide a union, upon request, with information which is relevant and necessary to the collective-bargaining relationship between the employer and the union and which is reasonably necessary for the union's performance of its function as bargaining representative. Conversely, a union has a duty to furnish such relevant and necessary information to an employer commensurate with and parallel to an employer's duty to furnish it to a union. *Iron Workers Local 207 (Steel Erecting Contractors),* 319 NLRB 87, 90 (1995), and cases cited therein.

Information concerning terms and conditions of bargaining unit employees is presumptively relevant and must be turned over upon request, without any requirement that the requesting party establish a particular necessity or relevance. Requests for information relating to persons outside the bargaining unit require a special demonstration of relevance. This relevance is established by use of a liberal "discovery type standard." Id.

Where there is an exclusive hiring hall relationship between the employer and the union, the Board has held that information relating to the operation of the union's hiring hall and its referral of employees is presumptively relevant both to collective-bargaining negotiations and to the administration of the collective-bargaining agreement between the parties. *Graphic Communications Workers Local 13 Union (Oakland Press),* 233 NLRB 994, 996 (1977), enfd. 598 F.2d 267 (D.C. Cir. 1979) (collective bargaining); *Asbestos Workers Local 80 (West Virginia Master Insulators Assn.),* 248 NLRB 143, 144 (1980) (administration of the contract). Hiring hall data are also relevant in view of the potential liability of employers in any hiring hall situation. *Laborers (Heavy Contractors Assn.)*, 285 NLRB 688, 689 (1987).

The Board has analogized the information on hiring hall referrals to information furnished by employers to unions concerning employee job classifications and wage rates, and that such information is "clearly relevant and necessary" for an employer "to evaluate the present referral practices under the existing contract, to test the validity of its [contract] proposals and to formulate future contract proposals on referrals." *Oakland Press,* supra at 996.

A mere claim of confidentiality is legally insufficient to overcome a union's obligation to supply data concerning its hiring hall, for the employer is not seeking the union's membership lists, but rather the list of applicants who utilize its hall. *Electrical Workers IBEW Local 497 (Apple City Electric),* 275 NLRB 1290, 1292 (1985), enfd. 795 F.2d 836 (9th Cir. 1986).

These principles demonstrate that Respondent has violated the Act by refusing to supply the requested information. The Board has specifically found that Respondent's referral practices and policies (items 1 and 2), lists and data concerning the "availability" of employees through the hiring hall (items 6, 8), and the identity of the individual responsible for the administration of the hall (item 16),[50] lists of employees on the referral list by category (items 7 and 22);[51] requests for referrals by all employers utilizing the hiring hall (items 9–13,) and lists of employees referred, by classification, to other employers which utilize the hall (items 9–13);[52] and the names of employees

[50] *Graphic Communications Workers Local 13 (Oakland Press),* supra at 995. Contrary to Respondent, the Board had no difficulty in defining the term "availability" and finding such information presumptively relevant.

[51] *Asbestos Workers (West Virginia Master Insulators Assn.)*, 248 NLRB 143, 144 (1980).

[52] *Laborers (Heavy Contractors)*, supra at 689.

utilizing the referral system (items 6–13)[53] are relevant and must be disclosed.

While no specific showing was required, Busch's problems in obtaining sufficient referrals from the hiring hall during the term of the prior contract establish the relevance of the requests for the fees charged by Respondent (items 3–5), the business hours and phone number for the hiring hall (item 15) and the requests concerning applications (items 17–20). Moreover, as Busch is ultimately liable for any discriminatory acts towards employees it employs, it was entitled to information concerning Respondent's policies and practices which would assure nondiscrimination (items 20 and 21). *Laborers (Heavy Contractors)*, supra at 690.

The requests in items 23–25 concerning information maintained by Respondent concerning its drug testing program and item 26 concerning the employment verification information are similarly relevant. Respondent undertook the drug testing and employment verification obligations pursuant to contractual agreements with Busch. Busch was entitled to the requested information to verify that Respondent was meeting those obligations. Busch was similarly entitled to the information to assess the proposals it had made to alter those two contractual agreements. Busch sought no information which was confidential or prohibited by law to be released. Respondent's contentions in this regard were simply designed to avoid responding to the requests.

Respondent's various responses to these requests consisted of fencing and playing games with Busch. At trial, no witnesses or evidence was produced to explain Respondent's refusal to provide the requested information or its reasons therefore. There is no evidence to support its claimed defense of confidentiality, repeatedly made. Moreover, the Board has rejected the defenses of confidentiality[54] and overbreadth[55] concerning the production of hiring hall information. Its defenses contending that it failed to understand "availability" and that Busch sought extensive "calculations" from Respondent are similarly unexplained and wholly unfounded. There is no evidence that Busch sought calculations from Respondent. At no time did Respondent attempt to explain the form in which it kept its raw data in order to reach an understanding of compliance with Busch. Only in September 1996, 2 *years* after the request, did Respondent reveal for the first time that the information is maintained on a simple calendar sheet for each referral, a single page per year for each referral. This information could readily have been copied and provided to Busch to provide its own analyses.

The extent of Respondent's game playing with Busch is revealed by its responses to Item 18 where, a year after refusing to provide a copy of its application form, it stated that the application could be provided, *yet never provided it,* even after this was brought out at trial. In fact, each of Respondent's answers is couched in language to make them appear facially plausible, though requiring interpretation and reading between the lines. Yet, none of them simply and specifically answer the questions posed, as the law requires. In totality, each written answer conforms to Attorney Domesick's response at the March 21, 1995 negotiations: "It's none of your damn business!"

Moreover, the sincerity of Respondent's written responses must be viewed against the background of its conduct during negotiations on these requests. Respondent's consistent sparring and avoiding answering these requests when posed during negotiations demonstrates that it was determined to refuse to disclose the information. Its defenses were simply a device to that end and were not sincerely maintained. Domesick admitted Respondent had successfully resisted Burke's request for similar information for 3 years and would resist Busch as well. Most telling was Domesick's statement to Busch that the information was "none of your damn business!"

These comments demonstrate that Respondent's defenses were not made in good faith, but were part of a calculated strategy to avoid providing the requested information and to frustrate the negotiating process. The convoluted manner of Respondent's answers to the request, requiring cross-referencing, indexing, and interpretation to be understood, evidences the same type of game playing Respondent demonstrated throughout the negotiations and at trial. Its primary purpose was to delay and frustrate the negotiating process.

In certain instances, Respondent offered responses a year after the request which may arguably be viewed as responsive to the request. (See, e.g., items 5, 11,12, 13, and 21.) Respondent provided no reason for its delay in making these responses, even if they are viewed to be adequate. Once a request for relevant information was made, Respondent had a legal obligation to provide relevant information reasonably promptly and in relevant form or adequately explain why it is unable to comply. *Detroit Newspaper Agency,* 317 NLRB 1071, 1072 (1995).

It cannot be disputed that Respondent failed to provide the information "reasonably promptly," nor did it provide, or offer to provide, any information, such as its referral information, in a reasonable form. Accordingly, Respondent further violated the Act by this delay in providing information. An unreasonable delay in furnishing information is as much a violation of the Act as an outright refusal. *Teamsters Local 921 (San Francisco Newspaper),* 309 NLRB 901 (1992).

4. The Employers health and welfare information request

Pursuant to its collective-bargaining agreements with Respondent, Busch participates in a multiemployer health and welfare fund, the Teamsters Local No. 122 Health and Welfare Fund (the Fund), on behalf of employees in both units. In recent years, no descriptions of the benefits paid to employees under the plan by the funds have been attached to the contract. Also participating in this Fund are Metropolitan Distributing Co., as did its predecessor Burke Distributing, and Charles Gilman Co. Busch, with over 200 employees, has the largest number of participants in the Fund.

The Fund is administered by trustees. John Murphy is a union trustee and chairman of the Fund. William Burke of Burke

[53] *Electrical Workers Local 497 (Apple City Electric)*, supra at 1292; see also *American Commercial Lines*, 296 NLRB 622, 651–654 (1989).

[54] See *Electrical Workers Local 497 (Apple City Electric)*, supra at 1292.

[55] See *Plasterers Local 346 (Brawner Plastering),* 273 NLRB 1143, 1149 (1984).

Distributing was the employer trustee until sometime in 1993. He was replaced on June 9, 1994, by Carmine Martignetti of Metropolitan Distributing. During the period between Burke and Martignetti, there was no employer trustee. The Union and employer trustees each vote as a block. The Fund's counsel is Stephen Domesick, who is also counsel to Respondent. The Fund shares office space with the Union.

The collective-bargaining agreements set the contribution levels of participating employers. Benefits and eligibility, however, are determined and adjusted solely by vote of the trustees.

Prior to the 1994 negotiations, Busch had concerns about the operations and stability of the Fund. During the 1991 negotiations with Busch, Respondent had indicated the Fund was financially insecure, an insecurity further stressed by the subsequent 3 year labor dispute with Burke Distributing.

Busch agreed to premium increases during the term of the 1991 contract. Despite this, Busch later learned of benefit and eligibility cuts for its employees during that period. One of these cuts was a loss of prescription drug coverage. Busch was not formally notified of any such changes by the Trust. Rather, on one occasion in October 1992, John Murphy told Pat Knipper that cuts were being implemented following an employee meeting to be held in a couple of days. Murphy did not specify whether he was acting in his union or Fund capacity in so informing Knipper. A month or so before the 1994 negotiations, Busch heard from employees that the drug coverage had been reinstated, though it received no such notice from the Fund or Respondent.

Busch was additionally concerned that its premiums were being used to fund benefits to employees of other employers. This concern arose from its position as largest participating employer, but also because Burke was not paying premium increases during the labor dispute, while its employees continued to receive benefits. This concern was further heightened by the fact that Busch pays family rate for all employees, even those with single coverage. Respondent refused to divulge to Busch what happened with these excess premiums.

Busch had additional concerns about the Fund's operations. By 1993, a dispute had arisen between Murphy and William Burke, the sole employer trustee at the time, concerning the Fund's operations. Burke was concerned for his own liability if he signed checks after Murphy had unilaterally changed benefit levels and eligibility requirements. From some time in 1993, when Murphy "accepted" Burke's resignation, until June 9, 1994, there was no employer trustee, and Murphy operated the Fund alone. About January 1, 1993, Murphy established a separate bank account from which only he could disburse funds. This new account was funded by a series of $745 withdrawals from the Fund's account by Murphy. The Fund's rules required employer and union trustees to sign checks over $750. The new account allowed Murphy to disburse funds in excess of $750 without an employer trustee cosigning the checks. This information was confirmed to Busch through a Price Waterhouse audit performed about December 1993. This information caused Busch concerns that the Fund was operating illegally.

Murphy approached Knipper in 1993, during the Miller contract dispute, and asked him to be a Fund trustee, replacing William Burke. Knipper was reluctant to accept because of his concerns about the legality of the Fund's operations and set certain conditions on his acceptance, including the performance of Price Waterhouse audit described above. By June 1994, Knipper still had not accepted a trusteeship and Carmine Martignetti, from Metropolitan Distributing, was appointed employer trustee. Respondent did not disclose Martignetti's appointment to Busch until questioned by Busch at the negotiating session of November 3, 1994.

Despite the appointment of Martignetti, Respondent and the Fund jointly sued Busch about September 1, 1994, to compel Busch to appoint an employer trustee to the Fund. During the negotiations, Stephen Domesick termed this joint lawsuit a "wake up call" to Busch concerning the upcoming negotiations. The suit was thereafter dismissed on Busch's Motion for Summary Judgment.

Despite its concerns about the Fund's stability and operations, Busch informed Respondent early in the 1994 negotiations that it did not intend to withdraw from the Fund and was prepared to maintain or increase benefit levels to employees. Busch expected the Fund to be a major issue in negotiations and anticipated a substantial demand for increased premiums by Respondent. Respondent did not make any economic demands concerning the Fund until April 16, 1996, when it proposed increases of 12–15 percent per year for 3 years, with 1 year of retroactive payments.

In order to address the concerns described above and prepare for bargaining concerning the Fund, Busch presented an information request directed to Respondent and the Fund at the negotiating session of November 3, 1994. Domesick initially refused to accept the request from Schmitz without even reading it, claiming it had to be submitted to the Fund. Domesick stated he "jealously guarded" the distinction between his two capacities. Schmitz informed him the request was submitted to him in both capacities—as counsel for the Fund and as counsel for Respondent—and that the information was needed for negotiations. After some discussion, Domesick accepted the information request.

In its request, Busch asked for the following information:

(1) A copy of the current plan document, including amendments and supplements.

(2) A listing of all benefits provided employees of any participating employer, including all changes in benefits, their effective dates and reasons for the change since November 13, 1991.

(3) A listing of all eligibility requirements for benefits provided to employees of any participating employer, including all changes in requirements, benefits affected and the effective date of the change since November 13, 1991.

(4) The financial contribution level of each participating employer since November 13, 1991, including any contribution levels contractually committed to following the date of the request.

(5) The Fund or the Union with any organization which provides benefits concerning the projected future cost of benefits with copies of any correspondence concerning projected future benefit costs.

(6) Minutes and other records from meetings of the Fund Trustees from November 13, 1991, with a specific request concerning actions of the Trustees to change benefits.

(7) A copy of the most recent audited statement of assets and liabilities and the most recent audited income and expense statement, as well as the most recent unaudited such statements, as well as any other documents showing the Funds assets and liabilities.

Domesick responded, on behalf of the Fund only, in a letter dated November 9, 1994. As to item 1, Domesick contended that a copy of the current Fund Trust Agreement had been served upon Busch in connection with the lawsuit jointly filed by the Fund and Respondent against Busch about September 1, 1994. As to item 7, Domesick enclosed a copy of the auditor's financial statement for the year ending July 31, 1993, promising to furnish subsequent reports upon receipt. Domesick refused, on behalf of the Fund, to provide any information requested in items 2–6, contending Busch had no ERISA right to such information.

On December 9, 1994, Eric Schmitz sent a letter to Domesick on behalf of Busch disputing Respondent's right to refuse to provide the requested information. Schmitz again explained his request was to both the Fund and Respondent, again explained the basis for the request and again requested compliance with it.

Domesick responded by letter of December 13, 1994. While it is not explicitly clear from the letter, it appears this letter was written by Domesick on behalf of Respondent, not the Fund.[56] In this letter, Domesick restates his contention that Busch is not entitled to the information under ERISA. Domesick contended that, because Busch had yet to make a *proposal* concerning the health and welfare fund, no relevance to the request could be established. He further states that the Fund had answered the request and that Respondent has no further obligation to provide the information. Domesick makes no contention that Respondent did not *possess* the requested information.

Respondent supplemented its response in a letter dated May 25, 1995.[57] This letter was evidently written in response to the authorization of a complaint by the Regional Director against Respondent for its refusal to provide the requested information. Respondent asserted it had no legal obligation to seek information from the Fund in response to the request. The letter further asserts that the Fund answered items 1 and 7. As to items 2–4, Respondent asserted that Busch had received the information through the Price Waterhouse audit of late 1993, and, further, that the information was in the Fund's, not Respondent's, possession. As to items 5 and 6, Respondent claimed the information was in the Fund's possession, not Respondent's. Thus, Respondent refused to provide any of the requested information.

Schmitz responded to Domesick by letter of July 7, 1995. Schmitz disputed Domesick's claim that Respondent did not have to seek the requested information from the Fund. He further disputed that Respondent had received the requested information through the Price Waterhouse audit. In particular, Schmitz noted that, contrary to Domesick's claim, Respondent, not the Fund, possessed the collective-bargaining agreements which set the contribution levels of participating employers.

By letter of July 11, 1995, Domesick responded, stating, for the first time, that the contribution rate for the Miller distributor remained the same as described in the Price Waterhouse audit even after Metropolitan took over. Domesick provided no other information. Respondent made no further response to the information request.

Busch had requested a copy of the Trust Agreement (item 1) so that, as a participant, it would have the most current and accurate information concerning the plan and its obligations under it. Busch believed it was entitled to a copy of the original agreement, not the retyped version provided by Respondent through its lawsuit, so that it could be satisfied as to the document's accuracy.

Busch sought information about benefit and eligibility levels and changes thereto (items 2 and 3) to assess the stability of the plan, to value Busch's contributions levels in preparation for negotiations and to address its concerns about the changes which had been made in these areas. Busch further wanted to assess the value of its contributions and benefits compared to other participating employers. Contrary to Respondent's contention, Busch had not received this information from the Price Waterhouse audit performed a year earlier, which is evident in the report itself. It would be expected that John Murphy would possess information as to both benefits and eligibility in his capacities on behalf of Respondent and the Fund.[58]

In a discussion at the negotiation session of November 9, 1994, John Murphy explained, off the top of his head, the eligibility criteria for benefits for Busch's employees.[59] Murphy did not provide this information concerning other employers. Curiously, when the Fund's and Respondent's initial responses to the information request were received *after* this discussion, they each refused to disclose this same information relating to any employer, including Busch.

Busch requested the contribution levels of participating employers (item 4) to determine if it was getting proper value from the Fund; to determine if it, as the largest participant, was funding benefits to other employer's employees and to assess the Fund's stability. This information would be contained in collective-bargaining agreements in Respondent's possession. While the Price Waterhouse audit did describe Burke's contribution rate as of 1993, it did not disclose rates since 1991, the rate at the time of the request, any future contract rates or the rates of other participants, such as Charles Gilman.

[56] In his subsequent letter of July 11, 1995, Domesick explained that by copying the letter to Murphy as secretary-treasurer, he made clear, in his opinion, that the letter was written on behalf of Respondent.

[57] Once again, it is not clear on whose behalf Domesick wrote the letter. Based on Domesick's assertion, it may be presumed to be on behalf of Respondent, since the cc: is to John Murphy as "Secretary-Treasurer", not "Chairman."

[58] Even Attorney Domesick believes Respondent possesses this information.

[59] Murphy did not explain whether he possessed this information in his capacity as chairman of the Fund or secretary-treasurer of Respondent. It is most likely that he was unable to separate the two functions.

In preparation for negotiations, Busch asked for correspondence between the Fund *or* Respondent with health benefits organizations concerning the future costs of benefits (item 5). This information, since it would be within Respondent's knowledge, would insure Busch was on an equal footing for negotiations and assist it in determining whether to continue participating in these funds. Busch believed Murphy possessed this information since he is the one who deals with insurance carriers on such issues. Busch further believed Murphy used this information as a representative of Respondent in preparing his proposal to Busch calling for a large rate increase. Respondent never denied it had any of the requested information (T. 1815–1818; 3365–3366).

Busch asked for minutes of Trustees' meetings (item 6) in order to verify that the Trust was acting within ERISA, particularly as to the changes in benefits and eligibility. Busch had not received such minutes since 1991. Respondent's initial response neither denied that such minutes exist, nor that they were in the possession of Respondent .

Busch asked for the most recent audited and unaudited financial statements of the Fund in order to verify its financial condition (item 7). The Fund is required to provide Busch and Respondent with its annual audited financial statement. Respondent did provide Busch with the statement for the year ending July 31, 1993, over a year earlier, and stated it would provide subsequent reports upon completion. No other reports were provided, however, either at that time or any subsequent time through the completion of the trial, by which time 3 more years of reports should have been completed.

Busch had assumed it would receive the requested information since John Murphy had willingly provided the same, or similar, information in the past. In 1993, when considering whether to serve as trustee, Knipper requested a variety of information from Murphy in his capacity as chairman of the Fund. Murphy provided Busch with a listing of the rates paid and total contributions for each of the contributing employers, copies of the health and welfare portions of each employer's collective-bargaining agreement with Respondent, as well as copies of the contracts which the Fund had with its insurers, which contained benefits and coverage information and a general description of the benefits at each employer. At no time did Murphy contend, as he did in response to the information request, that there was any legal impediment under ERISA or any other statute to the production of this information.

When Respondent made its demand for premium increases on April 16, 1996, a discussion occurred concerning the information request (GC Exh. 38(ao), pp. 1–10). Busch's negotiator, Arthur Telegen, told Respondent that Busch could not assess the proposal without the information it had requested, particularly the benefits levels and financial contributions of other employers. Domesick refused to be pinned down on whether the benefits paid by Busch were used to subsidize other employers. Telegen further asked Domesick to allow Busch to meet with Blue Cross representatives to obtain cost projections, since Respondent had refused to provide that information. Domesick refused to give permission. Telegen asked Domesick to provide what the Fund had paid Blue Cross for each plan in the last 3 years. Domesick refused, contending it was confidential.

During this session, Telegen asked Domesick if he had talked to an attorney for the plan or its Board of Trustees before making his demand for increased premiums. Domesick responded: "As you ask the question, the answer is no. If you ask can John [Murphy] compartmentalize and internalize. That's pretty damn hard." To Knipper, this admission validated his concern that Murphy's dual functions overlapped and could not be separated. He was, in fact, in control of both the Fund and the Union and using each to his benefit.

Despite his earlier contention, Domesick provided the information requested by Busch on April 16 at the next bargaining session on May 21, 1996. Domesick did not indicate whether he was providing this information as counsel to the Fund or counsel to Respondent, nor did he explain how or in what capacity he was able to obtain the information. At that meeting, Murphy also confirmed that he had, in fact, changed eligibility levels in the past. Murphy described what these levels had formerly been and stated that there was a lifetime cap on benefits for employees. Murphy did not explain in what capacity he provided this information, nor did he explain why he had not provided this type of eligibility and benefit information previously.

5. Respondent violated Section 8(b)(3) of the Act by refusing to provide the requested health and welfare information

In *Hospital Employees (Sinai Hospital)*, 248 NLRB 631 (1980), the Board held that a union has an affirmative obligation to direct its representatives among benefit fund trustees to provide an employer with relevant and necessary information concerning the trust funds. The Board held that the Union had an "affirmative obligation to make a reasonable effort to obtain the information, or to investigate reasonable alternative means to obtaining it, or to truthfully explain or document the reasons for its unavailability." Id. at 633 (footnote omitted).

Thereafter, in *NLRB v. Amax Coal Co.,* 453 U.S. 322 (1981), the Supreme Court held that the trustees of jointly administered trust funds are not agents of their respective parties but are fiduciaries whose duty to the trust overrides. This decision caused the Board to modify its holding in *Sinai Hospital.* In *Food & Commercial Workers (Layman's Markets),* 268 NLRB 780 (1984), the Board held the actions of trustees could not serve as the basis for finding a violation under the Act unless "a collectiv- bargaining representative demonstrates that it is in de facto control of a nominally independent trust fund." Id. at 781.

Whether or not the Union is in de facto control of the Fund, the Board has held that it has an obligation to provide any relevant information concerning the fund and its operations which it *possesses. Plasterers Local 346 (Brawner Plastering),* 273 NLRB 1143, 1144 (1984). Further, the Union is also required to respond to the request by investigating alternative sources of the requested information or to explain its unavailability. *Hospital Employees District 199E (Johns Hopkins),* 273 NLRB 319 (1984). The Union also may not act to prevent the employer from gaining access to the requested information and should cooperate with the employer to gain access to the requested information. *Food & Commercial Workers Local 1439 (Lep-Re-Kon Marts)*, 271 NLRB 774, 775 (1984).

There is no doubt that the information requested by Busch is relevant and necessary to collective bargaining. *Sinai Hospital,*

supra. Each of the requested items of information related to Busch's ability to administer the contract and to prepare for negotiations, where it expected the health and welfare plan to be a major issue. The request was specifically directed to *both* Respondent and the Fund, a point repeatedly made clear by Busch. Like the hiring hall information request, Respondent made no effort to comply. Rather, it engaged in typical game playing, making no meaningful response to the request.

Even as to item 1, the copy of the plan, Respondent's response was inadequate. Busch requested a *copy* of the actual document, not a retyped version from Attorney Domesick's computer. Particularly in light of the endless game playing by Respondent throughout this matter, Busch's request was not unreasonable. Only a signed copy of the original document could assure Busch that it had an accurate document upon which it could rely. Certainly, production of a photocopy of the original is of no greater burden to Respondent than production of a retyped computer version of the plan document.

Respondent had an obligation under the Act to produce the requested information. The facts demonstrate that Respondent, through John Murphy, was in de facto control of the Fund. At the outset, it must be acknowledged that Respondent produced no evidence whatsoever at trial concerning the relationship between itself, Murphy and the Fund, even though Murphy was available and did testify and Attorney Domesick is the counsel to both the union and the Fund. This fact warrants an inference that Respondent was in de facto control of the Fund. *Grimmway Farms,* 314 NLRB 73 fn. 2 (1994). Further, the facts which are known confirm that, at all times, Murphy and Domesick wear two hats, one for the Fund and one for Respondent, which are constantly interchanged. It is virtually impossible to know which hat is being worn at a given moment by either of them.

Murphy is both chairman and administrator of the Fund and secretary-treasurer and principal officer of Respondent. Stephen Domesick is counsel to both entities. These facts alone demonstrate that there is no independent counterbalance between the two operations. Respondent and the Fund also share office space.

Murphy operated the Fund alone, with no employer trustee, for over 18 months in 1993–1994, when there was a dispute concerning William Burke's serving as employer trustee. During this time, Murphy unilaterally changed employee benefits and eligibility requirements under the Fund. In the absence of an employer trustee, Murphy created a separate bank account on which he alone could issue checks. As shown by the Price Waterhouse audit in 1993, Murphy then funded this new account with a series of $745 checks, thereby subverting the Fund's rule requiring cosigners on checks over $750. When an employer trustee was finally appointed in June 1994, just before the onset of the Busch negotiations, Murphy did not inform Busch of this fact until questioned in November 1994. Rather, Respondent and the Fund, orchestrated by Murphy and Domesick, sued Busch on September 1, 1994, to compel Busch to appoint an employer trustee to the fund, while knowing an employer trustee was already in place. This joint cooperation between the Fund and Respondent was termed by Domesick a "wake-up call" to Busch concerning the negotiations. This fact conclusively demonstrates that Murphy controls the Fund and uses it to assist him in his role as a Union official.

Similar confusions between their respective roles was demonstrated by Domesick and Murphy at the bargaining table. Domesick admitted that Murphy could not compartmentalize and separate his two functions. The complete integration between the Fund and Respondent is demonstrated by Domesick's admission that there is no consultation between the two before Respondent made proposed premium increases. Obviously, when the entities are the same, no consultation is required or possible. Murphy also on occasion provided information at the bargaining table which he refused to supply to Busch pursuant to the information request. It is never clear in which capacity Murphy is speaking when he provides information at the table. This demonstrates that Murphy possesses the information in his dual capacity, that these "two hats" cannot be separated and that his refusal to provide the information is willful and in bad faith.

This confusion of roles extends to Domesick's correspondence on behalf of his clients. It is only clear on whose behalf Domesick is writing by the capacity in which he copies John Murphy on the correspondence. Thus, to third parties, it is not clear at all. Such obscurity can only be deliberate, and typifies the game playing which Respondent prefers to engage.

The facts are strikingly similar to those in *Hospital Employees (Sinai Hospital),* supra, where the Board found union representatives to be in de facto control of a trust fund. In *Sinai Hospital,* the funds executive director and its chairman of the board of trustees were also the vice president and president of the union and were responsible for negotiating collective-bargaining agreements. The Board found that both officials wore "two hats" which were intertwined. In refusing to provide the requested information, which concerned contribution and benefit levels of the benefit fund, the Board found that the controlling trustee was

> speaking with a union voice while wearing his fiduciary hat, an[d] that he was not acting solely in the interests of the employee participants and their beneficiaries, whose benefits ultimately depend on freely and fairly negotiated contributions from the employers, but rather was acting to support the interests of the Unions. [H]is action was inimical to the interests of the beneficiaries in that it undermined the good faith bargaining on which the employer contributions providing the benefits depend. [*Sinai Hospital*, supra at 633.]

Respondent and John Murphy are in de facto control of the Fund. Their refusal to provide the requested benefit fund information was not in the interests of fund participants, but rather in support of Respondent's "detailed bargaining" approach, designed to delay negotiations and forestall any impasse or strike possibility. Busch was prepared to discuss premium and benefit increases but needed the requested information to investigate the stability of the Fund and make appropriate proposals. To refuse the information in these circumstances served to prevent the possibility of increased benefits for employees and did not serve employees' interests in any manner. Only Respondent's institutional interests were served by those refusals. As the individual in control of both entities, Murphy had the obligation

to make an effort to obtain the information or investigate alternative means to obtain it. In Murphy's case, all he had to do was ask himself to produce it. This he refused to do.

Respondent, further, did not promptly respond to the request, either by seeking to obtain the information or providing the means to obtain it. Though served with the request simultaneously with the Fund, Respondent did not even respond until December 12, 1994.[60] This response merely reiterated the Fund's prior claim that Busch had no ERISA right to the information. Besides being legally incorrect, this response is not dispositive of Busch's rights under the Act. See *Hospital Employees District 1193 (Johns Hopkins),* supra.

Respondent did not cooperate with the request by providing the means to obtain the information. There is no evidence that Murphy ever asked the other trustees, or himself, to produce any of the requested information. Murphy could not afford to do so for they might have agreed to this legitimate information request, thereby subverting Respondent's bargaining strategy with Busch. Having been denied the information by the Fund, Busch had a right to have Respondent request the Fund to provide Busch with what it possessed. Respondent refused to do so. Insofar as Murphy controlled both entities and there is no evidence any employer representative was consulted or concurred in his decision not to provide the information, he therefore acted to impede Busch's access to the requested information. *Food & Commercial Workers Local 1439 (Lep-Re-Kon Markets),* supra. Unlike that case, where no violation was found because the Union assisted the employer in obtaining the information from the Fund administrator, Murphy *is* the equivalent of the Fund administrator in this case and, thus, his conduct must be viewed in that dual role. In refusing the request on behalf of the Fund, Murphy clearly determined his decision was a benefit to the Union at the bargaining table. This conclusion is further supported by the fact that Murphy willingly provided Busch with similar information in 1993 at a time when no collective-bargaining negotiations were occurring.

Even were Respondent not to be found to be in de facto control of the Fund, it still violated the Act. The information request was clearly directed to *both* Respondent and the Fund. There can be no doubt that Respondent possess at least some of the requested information. At a minimum, Respondent possesses the collective-bargaining agreements which set contribution levels. Murphy himself possessed other information, as evidenced by his knowledge and description of eligibility and coverage issues during negotiations. Murphy's orally providing similar information during the negotiations on May 21, 1996, further supports the conclusion that the requested information was within his possession and was deliberately withheld from Busch to gain a tactical advantage during negotiations. Respondent never explained what information it possessed. There is no excuse for Respondent's refusal to produce information in its possession. Such a refusal violates the Act. *Plasterers Local 346 (Brawner Plastering)*, 273 NLRB 1143, 1144 (1984).

Accordingly, I find that Respondent's refusal to provide information it possessed, its refusal to seek to provide a means to that information it did not possess and its impeding Busch's access to that information was in furtherance of its collective-bargaining strategy and in violation of Section 8(b)(3) of the Act. Further, as Respondent was in de facto control of the Fund, it had an obligation to provide Busch with each of the requested items of information. To the extent that Respondent may be viewed as having supplied information in its May 25 or July 11, 1995 letters or orally at negotiations, such delays in responding are in themselves unlawful and violate Section 8(b)(3) of the Act. *Teamsters Local 921 (San Francisco Newspaper),* supra.

6. The collective-bargaining negotiation—surface bargaining allegations

a. Background—The 1991 negotiations

The most recent collective-bargaining agreement negotiated between the parties was in 1991. The major parties to those negotiations were virtually identical to those in 1994. Attorney Stephen Domesick was the Union's chief spokesman. Secretary-Treasurer John Murphy was the chief union official present. Attorney Arthur Menard was Busch's chief spokesman. Patrick Knipper, Busch's president and general manager, was the chief company official present. All but Menard retained those roles in the 1994 negotiations.[61]

As they had been in the past, the 1991 negotiations were conducted jointly for the two units—drivers' and merchandisers. These negotiations consisted of about 8-9 sessions between October and mid-December 1991, when new collective-bargaining agreements in both units were reached. The negotiations generally began about 9–10 a.m. and lasted until 5–6 p.m. A Federal mediator was present during the 1991 negotiations. The contract, which was to expire on November 30, 1991, was extended with the Union's agreement to December 18, 1991, by which time agreement was reached. The final session lasted 44 consecutive hours. Except for the first meeting, which was scheduled in advance, subsequent meetings were scheduled at the end of each bargaining session.

Respondent included its economic demands in its initial proposals presented on the first day of negotiations in 1991. There was "horsetrading" by the parties concerning their proposals during the 1991 negotiations. Respondent made no information requests related to the negotiations in 1991. Attorney Domesick did not engage in extensive storytelling or philosophizing during the 1991 negotiations.

b. Respondent's 1994 bargaining strategy

In June 1994, John Murphy published an article in *The Labor Page* explaining his strategy behind Respondent's 1991 negotiations with Burke Distributing, Busch's primary competitor. Faced with concessionary economic demands by Burke, Mur-

[60] The fact that this letter by Domesick on behalf of Respondent references, quotes and relies on his earlier letter on behalf of the Fund is further evidence of the "two hats" worn by him and Murphy and the total integration of their respective roles. It further supports the conclusion of their de facto control of the Fund.

[61] Initially, Menard was replaced as chief negotiator by Attorney Eric Schmitz of the legal department of Anheuser-Busch Companies in St. Louis. On Schmitz' promotion about August 1995, Attorney Arthur Telegen became Busch's chief negotiator.

phy adopted a strategy to avoid the use of the strike, with its attendant possibility of unilateral contract implementation or permanent replacements for strikers. The purpose of Murphy's strategy was not to reach contractual agreement, but to stall negotiations and *avoid* either agreement, impasse, or strike. This created time to allow the Union's boycott pressures away from the negotiating table to wring concessions from the Employer at the table. This strategy involved the joint use of a consumer boycott campaign with "detailed bargaining" at the negotiating table. Murphy stated: "By so doing, the union denied Burke the opportunity to implement its demands or hire scabs. . . . This strategy translated into time to develop the most successful consumer boycott ever seen in Massachusetts." Murphy believed this strategy had been a success against Burke.

A key element of "detailed bargaining" was "making good use of the Union's lawyer, Stephen Domesick." The elements of "detailed bargaining" included "dissecting and arguing over every sentence that [the Employer] put on the table, making detailed requests for information and analyzing each answer." The parties held 40 negotiating sessions during the 25 months of the Burke negotiations. No new collective-bargaining agreement was reached.

The end result of the Burke negotiations was that "Miller Brewing Company recognized that the only way to end the boycott was to get rid of Burke Distributing and *sell its franchise to an employer who could do business with the union."* (Emphasis added.) Miller transferred its franchise to Metropolitan Distributing and, within 2 months, Respondent had negotiated a "decent" contract with Metropolitan.

An additional result of the franchise transfer for Respondent was a financial boon. Following the franchise transfer, Respondent was paid $590,000 by Burke Distributing. This amount was described as "Burke termination proceeds" on Respondent's 1994 LM-2 form. Respondent retained these funds in its treasury, paying none of it out to employees. Respondent offered no explanation for the purpose of Burke's payment of $590,000 to it following the loss of its franchise, nor did it explain what was done with the money.

These facts caused Knipper concern about the 1994 negotiations. He believed they gave the Union reason to use "detailed bargaining" to delay the negotiations in the hopes that Respondent's consumer boycott would result in the sale of his distributorship and a payoff to Respondent. As Knipper stated, "I can see 590,000 reasons why the Union would want to stall … [I]f the definition of success is the sale of the operation, and almost $600,000, then why not see what you can do with August A. Busch and Company. We're two and a half times the size. That could mean a larger payoff and the sale of the operation."

c. The 1994 negotiations

Unlike prior negotiations, in 1994 Respondent insisted on separate negotiations for the drivers' and plant units. Respondent presented its initial proposals to the Employer at the first negotiating session in each unit, on October 13, 1994 (drivers) and October 18, 1994 (plant). Unlike 1991 and prior years, Respondent made no initial economic demands. Rather, one page of each three-page document consisted of proposed new successorship language which would strengthen the Union's position in the event of a sale of the facility (known as the "Branch") by Busch. Respondent evidently anticipated a major issue concerning successorship for these identical proposals were drafted and prepared for presentation to Busch prior to the first meeting on October 13.

Busch admittedly had an ambitious agenda for the 1994 negotiations. It was not seeking economic concessions and, in fact, was prepared to improve the employees' economic package. Busch was, however, seeking operational changes in the way the Branch operated in order to respond to industry pressures, better manage its workforce and improve service to its customers.

Among the operational changes Busch was seeking was an attendance policy requiring employees to report to work daily, where no such requirement presently existed; elimination of the exclusive referral system, or hiring hall, allowing Busch to directly hire its own employees rather than hire through Respondent; elimination of the "pick bid" system, allowing Busch to directly assign daily routes to its employees; and the ability to assign one man per truck, rather than two as required under the present system. Most of these difficult, major issues arose in the drivers' unit and had no corollary in the plant unit. While Busch recognized this as an ambitious agenda, it was not tied to any particular means of achieving its goals. Busch fully expected to be able to reach a mutually satisfactory agreement with Respondent.

As negotiations ensued, however, it became clear to Busch that Respondent would not agree to, or sincerely negotiate over, Busch's proposals. Rather, Respondent was using its "detailed bargaining" strategy in negotiations to avoid the possibility of agreement, impasse or strike while it conducted a consumer boycott. This strategy included refusing to give Busch relevant and necessary information for negotiations, refusing to engage in frequent and lengthy negotiating sessions and, when at the table, engaging in a variety of delaying tactics. These included filibustering by lecturing and storytelling; engaging in extensive, detailed discussions of minor issues; delaying the submission of its economic package and other "game playing" tactics designed to frustrate agreement.

d. Murphy's threat that he won't agree to a contract

Respondent's objective in the 1994 negotiations was further demonstrated by John Murphy's own words. On September 28, 1995, 1 year into the negotiations, Frank Curtis was beeped by Murphy and returned his call. Both Murphy and Curtis had been present at the 13th drivers' unit negotiations held earlier that day. Murphy raised a question concerning the pay of two driver trainers, Freitas and McGil, who are in the plant unit. Murphy proposed bumping them into a higher wage category. Curtis told him to save that for the economic portion of negotiations, which had yet to begin.[62]

Murphy then turned the discussion to the negotiations held earlier that day. Murphy told Curtis that negotiations were going to get a lot worse and a lot of people's lives would be af-

[62] Respondent did, thereafter, make a proposal concerning the pay of Freitas and McGil.

fected. Curtis agreed that people were being affected, but said the Company had to make changes for the benefit of all employees. Murphy stated, "You will never get a contract out of me, and then everyone will really be affected." This threat by Murphy went unrebutted by Respondent, though Murphy was called as a witness in Respondent's defense.

e. Respondent's refusal to meet at reasonable times and for reasonable periods of time

Contrary to prior negotiations, Respondent insisted that the 1994 negotiations be conducted separately for each unit. Because of this insistence, the allegations concerning Respondent's refusal to meet with Busch should be considered separately, rather than collectively, for each unit.

The negotiations in each unit were characterized by infrequent meetings which were rarely consecutive, had long breaks between sessions, short negotiating sessions, and an unwillingness by Respondent to promptly schedule, or respond to, suggested meeting dates. These delay tactics were created and insisted upon by Respondent, which demonstrated a great reluctance to schedule meetings and an equal reluctance to spend a great deal of time at the negotiating table once present. Respondent engaged in this conduct despite the repeated urgings of Busch for lengthier and more frequent bargaining sessions in the hopes that a contract could be reached. Respondent, further, consistently refused to set aside blocks of time for negotiations.

Through the start of the trial of this matter on October 1, 1996, there had been 32 sessions in the drivers' unit in the 2 years beginning October 13, 1994. There had been 17 plant unit meetings in that same 2-year period, a total of 49 meetings in both units. This number bears a striking similarity to the Burke negotiations, where 40 sessions were held in one unit over a 2-year period.

A total of about 106 hours had been spent by the parties in face to face negotiations in the drivers unit during that 2-year period.[63] Between October 1, 1996, and the end of the trial on March 3, 1997, an additional seven sessions were held, totaling about 16 hours. Thus, in the drivers' unit, there were a total of 37 bargaining sessions in 30 months, totaling about 122 hours in negotiating time. This total compares with the final session in the 1991 negotiations which lasted 44 consecutive hours. Only two sessions in the 1994 negotiations, both in the first month, lasted longer than 5 hours. Negotiations in the drivers' unit in the 1994 negotiations averaged about 3 hours per session.

A total of about 54 hours was spent in face-to-face negotiations in the plant unit in the first 2 years of the 1994 negotiations. There were two additional sessions in the plant unit between October 1, 1996, and March 3, 1997, totaling about 4.5 hours. Thus, in the plant unit, there were a total of 19 bargaining sessions in 37 months, which totaled about 59 hours in negotiating time. The plant unit also had only two sessions, both within the first month of negotiations, lasting over 5 hours. The plant unit, when they did meet, also averaged about 3 hours per session.

There were considerable breaks between sessions in each unit. In the drivers' units, these breaks frequently ran to several weeks. On two occasions between sessions 4 and 5 and sessions 10 and 11, the breaks were almost 2 months. The breaks between sessions in the plant unit were even more extensive, frequently running to several months. Only two sessions were held in the 9 months between March and December 1996.

While Respondent's presence at the bargaining table was infrequent, its ability to schedule and conduct boycott demonstrations against Busch was not. During the 2-year period commencing Thanksgiving 1994, Respondent conducted about 200 boycott demonstrations against Busch. These demonstrations included the entire range of such boycott activity previously described, including publicity events, group shopping trips, standouts and demonstrations. These activities took place on any day of the week, in the early morning, the late afternoon and in the evening. John Murphy testified he attended all but two of these events. Yet, he would not make himself available outside working hours to negotiate with Busch.

Sessions in each unit were generally scheduled to start at 10 a.m. Most meetings were held at the Cambridge Hyatt Hotel. Wherever the meetings were held, Busch would pay for two rooms, one for the negotiations and one for its own caucuses. Busch's negotiating committee would be in its caucus room at least an hour before negotiations were scheduled to start. The negotiation room was made available to Respondent beginning an hour before the scheduled start. About 5–10 minutes before the scheduled start time, Busch would send a representative to the negotiation room to see if Respondent was ready to begin.

Despite these accommodations, Respondent invariably was not ready to begin negotiating as scheduled. With the exception of the very first driver's meeting, Respondent began *every meeting* late. Respondent was generally at least 30 minutes late, sometimes as late as 90 minutes. While Busch frequently complained about the late starts, Respondent never explained itself, except for two occasions where they said they had been caucusing.

Regardless of starting time, Respondent generally ended the sessions at about 4 p.m. The ending time of the meetings bore no relation to whether or not progress was being made. On at least 16 occasions in the two sets of negotiations, meetings ended early, even before 4 p.m., at the request of Respondent. While the legitimacy of these requests was not always disputed, certainly the frequency and timing of these requests created a pattern which was troubling to Busch. (See, e.g., meetings of January 6, 1995 (Tr. 1964); January 12, 1995 (Tr. 1966); February 3, 1995 (Tr. 1969); April 28, 1995 (GC Exh. 38(p), p. 1); May 3, 1995 (Tr. 1994); August 11, 1995 (GC Exh. 38(u), p. 25); September 19, 1995 (Tr. 2009–2014); September 28, 1995 (GC Exh. 38(w), pp. 17–19); October 24, 1995 (Tr. 2015); November 1, 1995 (GC Exh. 38(z), p. 22); November 16, 1995 (Tr. 2023); November 29, 1995 (Tr. 2029–2031); May 21, 1996 (GC Exh. 38(ap), p. 19); May 23, 1996 (GC Exh. 38(aq), p. 19–20); July 1, 1996 (GC Exh. 38(as), p. 9); July 31, 1996 (GC Exh. 38(au), p. 19). Not infrequently, sessions were scheduled

[63] These totals do not include lunch periods, but do include the frequent caucuses during which the parties were not actually meeting face to face. If caucus time were excluded, the actual negotiating time would be far less.

to end early due to Respondent's other commitments, i.e., January 18 and 19, 1996.

Sometimes illness was offered by Respondent as an excuse for ending early; sometimes no excuse was offered. Several times, Domesick simply stated he had to leave at a certain time. In the meeting of November 29, 1995, Domesick terminated the meeting peremptorily due a perceived "incivility" by Busch negotiator Arthur Telegen. Similarly, Domesick terminated the meeting of May 23, 1996, in a contrived fit of pique after Telegen stated Domesick had "pissed away the day" on a substantive issue.

It is evident that a perfunctory pattern of negotiations developed, primarily due to Respondent. Negotiations would be scheduled for normal working hours between 10 a.m. to 4 p.m. but, due to late starts, early departures and lunch breaks, would rarely consist of more than 3 hours per day of face-to-face negotiations. Negotiations virtually never began early and rarely ran later than 4 p.m. in either unit. Respondent refused to agree to meetings at night, on weekends or on consecutive days. This pattern negated any sense of urgency to the negotiations, serving Respondent's purposes of delay.

Respondent also canceled seven bargaining sessions. Attorney Domesick canceled the session of December 12, 1994, contending he needed time to write a brief to the district court concerning the 10(l) injunction being sought in the group shopping case. That brief was due at noon on December 12 at Domesick's request. He refused Busch's suggestion to start negotiations later that afternoon. Domesick then canceled the driver's negotiations on December 14 and 19, 1994, due to his own illness. These cancellations resulted in a hiatus in negotiations of 2 months *immediately* following the contract's expiration. (Following this hiatus, Respondent ended the next three consecutive drivers' meetings early.) Thereafter, Domesick canceled two drivers' unit negotiations on August 21 and 28, 1995, claiming he was ill. Respondent canceled the plant negotiations of March 20, 1996, and the driver's negotiations of June 26, 1996, because injunction hearings in Federal court concerning its picketing activities were scheduled on those days. Respondent never offered to reschedule any bargaining session which it canceled.

During the 2 years of negotiations, Busch canceled only two sessions, on December 21 and 22, 1995. These cancellations were caused by a blizzard in the Boston area, which closed Busch's Boston operation and precluded its negotiating team from flying in from St. Louis.

It was Busch's belief that the major issues were in the drivers' unit and that the plant unit contract would settle as soon as the drivers reached agreement. Even members of Respondent's plant unit negotiating committee agreed with this assessment. On two occasions in early 1995, Robert Graham told Pat Knipper that he did not understand why the parties were meeting in the plant unit because they would settle as soon as the drivers did. Graham said he felt the parties-time should be focused on the drivers' unit, not the plant unit. Nevertheless, the Union, particularly in the first year of negotiations, insisted on alternating meetings between units. This insistence by Respondent, coupled with its general unwillingness to agree to more than one session per week, created long hiatuses between each unit's bargaining sessions. These long breaks made it difficult for either negotiation to gain any momentum.

Respondent made the scheduling of negotiating sessions difficult. While Busch consistently offered blocks of time for negotiations, Respondent only made itself available for a day at a time. These dates were only rarely consecutive and generally only 1 day per week. Respondent's refusal to schedule consecutive meetings caused momentum to be lost in negotiations. Moreover, proved especially difficult for the members of Busch's negotiating team, including its chief negotiator, Eric Schmitz, who had to fly to Boston from St. Louis for a single day of negotiations. Further, on certain occasions, such as its proposing a single day of negotiations on November 22, 1994, and on July 3, 1996, Respondent appeared to offer dates because it knew they would be difficult or impossible for the negotiating committee from St. Louis to make travel arrangements to attend.[64]

Respondent never initiated discussions concerning additional negotiating dates but, rather, responded only to Busch's initiatives. Unlike the 1991 negotiations, Respondent would generally not agree during one session to schedule additional bargaining sessions. Respondent's attorney would offer excuses, if at all, such as he had not brought his calendar or had not discussed scheduling with his client, John Murphy, who was invariably seated next to him. Rather, most scheduling was done by correspondence between the negotiating sessions, contributing to a delay of weeks between sessions. When Busch offered blocks of dates, Respondent generally delayed in responding, sometimes for weeks. This caused some of the offered dates to become unavailable and caused additional difficulties for Busch in making travel arrangements from St. Louis.

The pattern of Respondent's desire to delay negotiations was set at the outset. In a meeting on September 20, 1994, Schmitz asked John Murphy about negotiating dates for the contracts, which expired November 13. Murphy stated he was available every day except October 10. By letter of September 22, Schmitz proposed to Domesick that the parties commence negotiations October 3 and stated a virtual total availability through November 13. On September 23, Domesick contradicted his own client, telling Schmitz that he had not had an opportunity to talk about dates with Murphy, who Domesick claimed was in negotiations virtually every day. Eight days later, in separate letters, Domesick agreed to a single day of negotiations, in separate weeks, in each unit, on October 13 and 18 for the drivers and plant, respectively. Thus, while Busch had sought dates in each unit to begin negotiations almost 2 months before contract expiration, Respondent did not agree to commence negotiations until a month, or less, before contract expiration.

Domesick terminated the October 13 meeting at 1:04 p.m., proposing to meet again on October 24. Schmitz offered to continue longer that day and stated Busch was available before October 24. Domesick stated he needed time to review Busch's

[64] November 22, 1994, was the Tuesday before Thanksgiving and a notoriously difficult travel day, especially when only proposed a week earlier. It was the *only* negotiating date offered by Respondent which Busch rejected in the entire process.

proposal and stated, "I have other things to do." Schmitz persisted in seeking additional dates beyond October 24 in a telephone call with Domesick on October 17. Domesick, as became practice, demurred, stating he "would have to talk to John [Murphy]."

At the following day's meeting on October 18, Schmitz again sought additional negotiating dates. Domesick again stated he had not talked to Murphy (who was seated next to him) and would speak to him the following *week*. When Schmitz expressed his concern over their inability to schedule meeting dates, Domesick refused to give any until the following week and, in a candid admission, stated:

> A date is just a signpost. If the parties are making progress, it doesn't matter . . . . If my review of the proposals is any indication, I don't think there is ever going to be enough time.

No further dates were set until the October 24 meeting, at which Domesick agreed to meet on November 1 and 3, but not on November 2. Domesick refused to set further dates at the November 1 meeting, claiming that some of his time would be occupied in responding to Busch's motion to dismiss in the lawsuit which *Respondent* and the Trust had filed against Busch.

At that drivers' meeting of November 3, Schmitz again requested additional dates. Domesick offered November 9 and 10, one per unit. In refusing to offer more, Domesick stated: "If we're making sufficient progress, we'll continue because if we're not . . . . What's the sense of it? We are wasting time." Domesick then clarified his objective concerning his unwillingness to schedule, stating: "It's nice to have a time limit facing you. Having a gun to your head tends to make you make decisions more quickly. If there is time urgency, it lets people get to issues that are dear and forget those that aren't." When Schmitz persisted that Busch remained available every day while Respondent refused to agree to meet, Domesick stated: "It's a function of mine and John's schedules. I have other clients. You have one client. I don't have the luxury of that."

On November 9, the last scheduled plant session before contract expiration, Domesick sought to end at 6:29 p.m., flippantly stating, "I should have gone home and had dinner by now." Domesick refused to continue or to schedule any further meetings even though the contract was about to expire, blaming his resistance on the Employer's proposals:

> If those proposals stay on the table, there isn't enough time between now and Sunday night expiration to get through them. If we want to make a stab at it, it's going to require radical review by the Employer as to its objectives regarding this unit.

No further negotiating sessions were scheduled at this meeting.

At the last drivers session before expiration on November 10, Domesick stated Respondent's position even more explicitly:" until the Employer re-appraises and examines its proposals, we're not making progress and there is no point in sitting here and continuing." Schmitz persisted in seeking additional meetings in the 3 days remaining before expiration, which was the Veteran's Day weekend. Domesick attempted to place the onus of negotiations upon Busch, stating:

> I'm a Union lawyer. Holidays and weekends are sacrosanct. I practice what I preach. . . . I told you if I thought we'd make progress, I'd meet. But if we are not making progress, why violate the sanctity of holidays and weekends, to what end? Do you have any revisions? Any change in your positions or are we going to be dealing with the same drive we have seen to change things. . . . I don't see a reason to do marathon sessions and meet holidays and weekends, when you haven't removed anything from the table.

Immediately thereafter, Respondent rejected Busch's offer of an extension of the contract. Domesick saw no need for an extension without a revision of Busch's proposals, which he defined as "get your shit off the table." Respondent also rejected the involvement of a federal mediator in negotiations. No further meeting dates were set before contract expiration.

Busch codified its objection to Respondent's refusal to meet, and its refusal to provide more than one date at a time, in Schmitz' letter of November 14, 1994. On November 15, Domesick knowingly offered a single date of November 22, the Tuesday before Thanksgiving, which, as previously described, Busch could not accept. On November 17, Busch offered to meet every day between December 1 and 21. Domesick, as was the pattern, accepted only two dates, December 12 and 14. These meetings were thereafter canceled by Respondent, as was the meeting on December 19, for reasons previously described.

A heated exchange of correspondence was exchanged between the parties at this time concerning this delay in negotiations and the responsibility for it.[65] The correspondence ended with Schmitz' December 19, 1994 letter offering to meet virtually the entire month of January in addition to the scheduled meeting of January 6, 1995. Typically, Respondent delayed in responding until the end of the January 6 session, at which time it offered to meet on January 12, and then again on February 1. Respondent offered no explanation for its unwillingness to meet more often.

Respondent's tactics created a 2-month hiatus in meetings between November 1994 and January 1995, just after contract expiration. There were only three meetings in the month upon resumption—two for the drivers; one for the plant. This pattern of Busch dragging a reluctant Respondent to the bargaining table persisted through the remaining 2 years of negotiations. Busch's continued pleas for more frequent meeting dates due to travel constraints from St. Louis and for prompt responses to proposed meetings were unavailing.

Respondent adopted the attitude that the burden of scheduling negotiations fell to Busch and that Respondent need only play a reactive role. This passive attitude, and Respondent's game playing concerning scheduling of sessions, became most apparent in the events of early 1995.

Evidence of this attitude is Domesick's comment in his letter to Schmitz of February 10, 1995, that "No additional meeting

[65] Ironically, in his correspondence Domesick accuses Busch of behaving similar to Burke. Rather, it is Respondent which duplicated its conduct from the Burke negotiations.

dates were suggested by the Company by the end of our February 10 meeting for the Plant unit." Domesick then suggested two meetings, March 21 and 29, 6–7 weeks away. Domesick ignored the fact that, on January 11, fully a month earlier, Schmitz had proposed meeting on *14 dates* between February 2 and March 3. Typically, Domesick had accepted only two of those dates in separate weeks, February 3 and 10, ignoring the remainder. In so doing, he apparently believed he had shifted the ball to Busch's court to propose more meetings at the February 10 session. Nothing, of course, had prevented Respondent from proposing further sessions at any time.

On February 15, Schmitz vehemently objected to Respondent's insistence on the 5-week hiatus in negotiations until March 21, its refusal to provide more than a date a week and its refusal to schedule more than one date per unit at a time. Domesick, in response, claimed that he was unable to meet until late March because of a trial the first 3 weeks in March. His claim that he was somehow denied the opportunity to share this information on February 10 rings false. Domesick did not disclose to Busch that his trial was before the NLRB concerning the Burke Distributing case, which would have allowed Busch to monitor the status of the trial. On February 28, Schmitz requested prompt notice should Domesick's trial not consume 3 weeks, so that further negotiations could be scheduled. Busch heard nothing from Respondent until the beginning of the March 21, 1995 session.

At the outset of the March 21, 1995 negotiating session, Schmitz asked Domesick about his trial. Domesick merely stated that it had settled with the Regional Director taking a unilateral settlement. Thereafter, Domesick admitted the trial had been postponed "on the courthouse steps." When Schmitz pressed him on why he had not tried to reschedule negotiations, Domesick responded, "I think the record reflects we've been meeting." After Schmitz complained about the delay between meetings, Domesick stated: "If you're dissatisfied, I can't answer that. If your talking of delay, then change your proposals." Schmitz continued to accuse Domesick of improperly delaying the negotiations. Domesick initially contended his schedule was demanding and then stated: "You want to reduce the size of your menu?" When Schmitz continued to complain about the lack of meetings, Domesick stated:

> You think if we meet more frequently, we'll reach an agreement. Maybe the reason progress is not occurring is that your menu is too large. If you're looking for progress reduce your menu.

As the meeting continued, Domesick repeatedly conditioned further negotiations on Busch's willingness to continue dues checkoff. Busch had continued dues checkoff until about March 1995, even though the contract had expired in November. When Respondent had argued in its Trust Fund lawsuit against Busch that an implied-in-fact contract existed between the parties because Busch was continuing to check off dues, Busch ceased dues checkoff. Domesick spent most of the March 21 meeting attempting to reinstate dues checkoff, rather than engaging in substantive negotiations.

Domesick insisted that a lack of checkoff would cause Respondent to meet even less frequently. He stated that not having dues checkoff:

> will cause a dislocation in our negotiations . . . . Because it will cause us to negotiate less and focus on how we'll collect our dues. So we can pay for representation. All we need is for you to say "okay." It will show you want to be in a good relationship with us.

He continued this theme thereafter, stating:

> You say, you want to arbitrate, sue us. You want to collect dues—do it yourself. The tree of evil bears the fruit of evil. Give us an example of your desire to continue this relationship. . . . It's hurtful and will harm our capacity to reach mutual agreements, because it will now take our resources to devote to other issues—such as dues checkoff.

Schmitz stated: "Your position now is that you will forestall negotiations further because of dues collection." Domesick responded: "We have a finite degree of resources."

Domesick continued to try to persuade Busch to resume checkoff, later stating:

> You have the right to say no. But there are consequences to that that are contrary to what you say your objectives are. Its gotta have an impact on how we view the Employer. To the extent that we are going to have to take time out to ensure our income stream, that will take time out from time available for other things that you have an interest in doing. You should say okay quite easily and get on to more substantive matters. But it says a different agenda if we have to bear the pain of this (dues collection), it will only harm our capacity to reach meaningful agreement.

Later in the March 21 meeting, Schmitz complained about Respondent's unwillingness to meet. Domesick told him to file an unfair labor practice charge. Schmitz asked Domesick to discuss meeting dates. Without explanation, Domesick initially responded that they had to leave, then stated that the month of May was out, completely ignoring the possibility of April meetings as well. When Schmitz offered April 7, Domesick, in a profane exchange, terminated the meeting and walked out. In a classic example of his game playing throughout negotiations, Domesick returned to the room within a minute, picked up his coat and said, "It is real hard to make a dramatic exit when you leave your coat behind." No further dates were set for negotiations.

Busch thereafter continued to press for additional dates, offering at the April 4 meeting an extensive series of dates during April, May and June, including weekends. Domesick said he was not sure when he would be able to meet again because he was so busy. Of course, as had become habit, Domesick did not have his calendar with him at negotiations so scheduling could be finalized. Characteristically, Domesick subsequently agreed to three dates, in separate weeks, in April and May, continuing to ignore June even after Schmitz wrote to him on April 10 requesting a response.

At the May 22 meeting, Domesick asserted that meeting in the month of June was out, proposing instead to resume on July

24. Domesick did agree to entertain dates in the last 2 weeks in June if a previous Board trial scheduled in this matter settled. That trial was settled after 4 days of litigation. On June 23, Domesick faxed an offer to Schmitz to meet on June 29. Somehow the fax was sent to the wrong fax number and Schmitz did not receive it in time to set up the meeting. This is the only time throughout these negotiations where Respondent made an apparent attempt to adjust its schedule to meet with Busch.

During the summer of 1995, Respondent continued to agree to a single meeting per week and scheduled only 2–3 meetings per month for the two units. Domesick stated that reasons such as busy schedules and his personal unwillingness to work the Friday before a holiday weekend precluded the possibility of back-to-back meetings.

Domesick's claimed illness caused the cancellation of two August 1995 meetings, causing a hiatus of 7 and 8 weeks between meetings in the drivers' and plant units (GC 50). On August 24, Busch proposed 10 September dates and requested Respondent's October availability; Respondent agreed to only two September dates.

By the September 19 plant meeting, Arthur Telegen had become Busch's chief negotiator. Domesick stated that his health precluded him from working full days or having back to back meetings, with the next 30–45 days critical to his recovery. Busch offered to accommodate Domesick in several ways, including proposing to put off negotiations for that period with a commitment to meet for 2 weeks in December and 1–2 weeks in January. Domesick responded:

> I don't want to do that. I don't want to commit to that. I don't like marathon sessions. We've done it a few times when we were nearing expiration of a contract and it was productive. You've complained to the Board about meetings, we'll let them sort it out.

Despite Busch's offer and attempts to accommodate Domesick's health, Respondent continued to agree to meetings as before, alternating meetings between units with single day sessions and only 1–2 sessions per month.

Telegen regularly complained about the pace of negotiations and the infrequency of meetings. At the November 29 meeting, Telegen complained that negotiations would not be concluded in the 20th century at the present pace. Domesick responded that was because of the number of Busch's demands. At the November 30 meeting, Telegen proposed the parties set aside blocks of time in the future when their calendars were clear to expedite negotiations. Domesick ignored this offer. Domesick continued to resist consecutive meetings, finding them "too taxing." Domesick even contended that commencing negotiations after 2:30 p.m. was "unduly taxing."

Over the succeeding months, Busch consistently proposed, in correspondence and at meetings, that the parties set aside blocks of one or 2 weeks for negotiations several months in advance in order to generate some momentum. Respondent generally ignored these offers; certainly it never agreed to them. Domesick continued to state that back-to-back meetings left him "depleted." Domesick also indicated he was concerned that, were Respondent to agree to additional meetings at this point, it would adversely affect Respondent's case in the pending complaint before the Board on that issue. On another occasion, when Busch proposed 2 weeks of negotiations to make some progress, Domesick said he had to write a brief, later stating it was not "economical" to devote 10 days to negotiations.

Respondent continued to delay in responding to offered dates, creating further scheduling problems as intervening commitments arose for Busch. For instance, at the Friday, January 19, 1996 meeting, Telegen requested the scheduling of negotiations in March. Domesick agreed to respond by Monday. Despite two subsequent written requests from Telegen and two other letters by Domesick to Telegen concerning scheduling, Respondent did not propose any March dates until February 6. Typically, Respondent proposed four meetings over 3 weeks, none on consecutive days.

At the February 20, 1996 meeting, Telegen proposed extensive negotiations during 3 weeks in April. Domesick said he would try to respond by the end of the day, but did not do so. At the February 21 meeting, Domesick still was not prepared to agree to any dates in April. No further response was made until the meeting of March 19, 1995, a month later, when Respondent proposed five dates in April, all on nonconsecutive days. One was a date Busch had not offered. Because of Respondent's delay in responding, Busch was then only available on one of the offered dates, resulting in only one April meeting rather than several.

Like a metronome, Respondent continued to agree to only 2–3 meetings per month through the summer of 1996 when conflicts with the scheduled trial of this matter inevitably began to arise. Respondent sought postponements of this litigation in return for additional bargaining dates. Busch again proposed blocks of weeks of negotiations to warrant a trial postponement. Respondent offered only a series of generally non-consecutive dates for negotiations. Busch agreed to dates which did not conflict with the litigation of this matter and proposed others should Respondent agree to litigate and negotiate simultaneously. Respondent did not so agree and the parties thereafter intertwined their negotiations with their litigation.

f. Respondent's surface bargaining by use of detailed bargaining tactics

During the 1994 negotiations, Respondent made use of the tactics embodied in its "detailed bargaining" strategy described by John Murphy in *The Labor Page* to delay and prolong the negotiations and to avoid any agreement or impasse. As previously described, Respondent's consumer boycott campaign against Busch continued unabated during the negotiations. When it did come to the negotiating table, Respondent showed no intent to reach agreement but, rather, sought to hinder and delay the negotiating process. In the first 9 months of negotiations, Attorney Domesick consumed much of the limited negotiating time by lecturing and storytelling or, in essence, filibustering the negotiations. This practice diminished dramatically following Busch's filing of its unfair labor practice charge, only to be replaced by other tactics. Respondent also used "detailed bargaining" to extensively discuss and analyze in minute detail issues of relatively minor consequence, thereby limiting discussion of more vital matters. Respondent delayed in making its

economic proposals for several months, even after Busch's requests to produce them. Respondent engaged in a number of other "game playing" tactics, such as refusing to explain its proposals, reneging on agreements, making regressive proposals, and refusing to explain or make counterproposals. These tactics absorbed negotiating time and impeded the parties' ability to agree. Respondent further made eight information requests of Busch during the first 8 months of negotiations and made no use of Busch's responses during negotiations, thereby unnecessarily consuming Busch's time and resources and further delaying the process.

In their totality, these "detailed bargaining" tactics evidenced Respondent's desire to avoid reaching an agreement and to prolong negotiations in the expectation that its consumer boycott would cause Busch to withdraw its contract demands or, in the alternative, sell the distributorship to a more amenable employer, as Burke had done.

Respondent would never agree to the use of a Federal mediator to assist the parties in reaching agreement. Busch initially proposed bringing in a federal mediator at the end of the November 10, 1994 session, just before contract expiration. Respondent rejected the overture. Curiously, Respondent at that time also rejected Busch's offer of a contract extension, conditioning acceptance on Busch changing its proposals. On November 14, 1994, Domesick stated that mediators were only useful when the distance between parties was in millimeters, not miles. Busch continued to press for a mediator on other occasions, including on April 4, 1995. Respondent rejected the concept out of hand.

As previously described, Respondent also refused throughout the negotiations to provide Busch with information necessary for two of the major issues in the negotiations-the hiring hall and the health and welfare plan. The effect of these refusals was to force Busch to negotiate in the dark on these two issues, minus the information Respondent itself possessed concerning the operation of Respondent's hiring hall and the funding and benefit levels of its health and welfare plan. No agreement was reached on these two issues.

The effect of Respondent's conduct was to preclude any collective-bargaining agreement by the parties. In fact, in over 2 years of negotiations, only *11* agreements on issues were reached. Only four company proposals were agreed to. Most were minor; three involving the deletion of one obsolete side letter of agreement and moving two others into the body of the contract. No agreement was reached on any of Busch's major issues. Only six of Respondent's proposals were agreed to, one involving a statutory name change. While some were of obvious benefit to the bargaining unit, none could be termed major issues.[66] The parties also agreed jointly to a proposal reflecting a name change in their credit union. Such a total dearth of substantive agreement in over 2 years of negotiations is indicative of surface bargaining and the effectiveness of Respondent's "detailed bargaining" tactics.

[66] These included a training proposal, 1-day vacations, bereavement leave for "spousal equivalents," increased compensation for certain temporary assignments and a reduction in years of service required to receive 4 or more weeks' vacation.

aa. Filibustering/storytelling

Respondent used its chief negotiator, Attorney Stephen Domesick, to filibuster during the period of October 1994—May 1995. Domesick accomplished this by his philosophizing and his storytelling. These tactics consumed valuable negotiating time that could have been spent on substantive discussion of issues and proposals.

Particularly in the first few months of negotiations, Domesick spent considerable time "philosophizing" or lecturing to Busch. The topics of these lectures frequently centered on power and its uses, Domesick's perceptions of Busch's bad business judgment and Domesick's belief that Busch should sell the distributorship. Frequently, these lectures were interspersed with, or illustrated by, various stories Domesick chose to share at negotiations. These lectures did not advance the negotiations or deal with specific proposals but, rather, frustrated the process by taking time away from discussion of legitimate issues and disrupting the parties' momentum.

Domesick had not engaged in this type of philosophizing or lecturing during the 1991 negotiations. The lectures given by Domesick in 1994 could even be discerned visually. Frequently, they took up almost a page or more of Busch's typed, single spaced negotiating notes. In the very first bargaining session on October 13, 1994, the majority of the meeting consisted of Domesick's lecturing and storytelling. Domesick consumed almost four pages of notes in a lengthy explication, interspersed with various stories and allegorical references, of why Busch's proposals were improper and how Respondent would prefer to deal with a small local businessman rather than Busch.

Similarly, much of the first plant meeting on October 13 was devoted to Domesick's lectures and storytelling. He continued to lecture on the advantages of exploring the passage to a new employer other than Busch, the bad decisions which companies make and why what Busch was doing was bad. These lectures took up a considerable amount of time that could not be devoted to a substantive discussion of proposals. That these extensive lectures occurred in the limited meetings before contract expiration further debilitated the negotiations.

When Busch complained about his lectures and storytelling, Domesick would respond that he could not help himself, that his ancestry and passion were to blame.[67] Domesick further explained that his mission was not to negotiate, but to convince Busch that what they were trying to do was wrong.

During the October 24, 1994 session, Domesick lectured at length on how there was no need for Busch's proposed changes in contract language. Schmitz responded, "We are willing to listen and address your concerns. Give us some proposals to deal with your concerns. Domesick responded, "What's the value in getting shot?" and refused to give any proposals. Later in the meeting, Schmitz attempted to shorten another Domesick lecture contending there was no necessity for Busch's proposals, stating: "I don't mean to cut you off. I don't know who you are lecturing for, me or who. I've heard your philosophy. Let's talk about the proposals. You've made your point." To which

[67] Domesick never explained why this disability did not hamstring the 1991 negotiations between the parties.

Domesick responded: "We all have buttons. You hit one of mine. When we talk real truth from this side of the table, I don't know how you can call it philosophy. There's nothing philosophical about it. I'm worried about the families, the employees." Schmitz told Domesick he need not keep making the same points and Domesick stated he would make them as many times as was necessary.

This pattern continued throughout the early negotiations as Domesick made repeated lengthy expositions, rarely using a few words when he could use many. From the outset, Domesick had repeatedly contended his loquacious behavior was because "I'm a high involvement speaker . . . I can't help it if I'm an Eastern European Jew and we're high involvement speakers." Domesick further stated that being a high involvement speaker caused him to interrupt frequently and be passionate about his topics. Whatever that characterization means remains unclear, for Respondent offered no testimony on this issue. However, this frequently offered explanation did not explain why there had not been similar conduct by Domesick in 1991.

Domesick continued using negotiating time for lectures and philosophizing on January 6, 1995, following the 2-month hiatus in negotiations after contract expiration. Domesick spoke of his philosophy regarding capitalism and suggested Busch engage in price fixing with its competitors to improve its profit margin. This continued into a full page lecture concerning how Busch has not converted enough spares, which included references to Somali citizens and lawyers fees. In a dramatic display of loquaciousness, Domesick followed this with a lecture consuming *one and one-half page*s of bargaining notes concerning a Busch proposal on work scheduling. As Knipper stated, Domesick could have saved considerable negotiating time by simply stating: "I think your proposal stinks."

In the January 12, 1995 meeting, Domesick continued with several lectures weaving through a variety of well-covered topics, including power and the lack of necessity for Busch's proposals. Over half of this meeting consisted of Domesick lecturing, rather than in substantive discussion.

The meeting of March 21, 1995, was almost entirely consumed with lectures by Domesick concerning why Busch should reinstate dues checkoff. In later meetings, Domesick continued to lecture on power and his own philosophy of management; and compared his political views to his perception of Busch's ("I don't have to rely on the law. You rely on Newt Gingrich and Strom Thurmond. If I have to rely on Newt Gingrich for labor law, I'm in deep doo-doo").

In addition to consuming negotiating time, one of the effects of such lecturing on unrelated matters was that it distracted the parties from the issues at hand. On many occasions, Domesick made his point repeatedly, to the point that Busch would tell him to stop. Busch's efforts to stop Domesick's lecturing were unavailing. Domesick ceased this tactic only after Busch filed its unfair labor practice charge.

Domesick's lecturing during the first 9 months of negotiations was interwoven with his penchant for storytelling. These stories, which frequently preceded, ended or were in the middle of lectures, also took time away from negotiations, delaying the process and frustrating Busch's negotiating team. Like the lectures, these stories distracted negotiators from the matters at hand, particularly since they bore no direct relation to contract issues. While Domesick contended it was his nature to speak in analogies and parables, he had not engaged in similar behavior during the 1991 negotiations and, as with his lecturing, virtually ceased his storytelling once Busch filed its unfair labor practice charge. This confirmed Busch's belief that the storytelling was a tactic used to delay negotiations.

Busch recorded over 90 stories and offensive comments[68] related by Domesick during the first 17 negotiating sessions in the two units (GC Exh. 54).[69] Domesick frequently told between 7–12 such stories per meeting, particularly in the early meetings. Most of the stories contained sexual or ethnic references and innuendo.

Knipper classified Domesick's stories into categories. The first were "Steve Domesick's slices of life," which were shorter opinions or comments from Domesick's life and had nothing to do with the issue at hand. An example would be his frequent reference to "why a dog licked his balls—because it could." A further example was Domesick's telling of the much longer "senior employee in the bordello" story, as related by Knipper. While this story may have had some relation to principles of seniority, Knipper did not find that it advanced negotiations.

Knipper's second category was termed "Steve Domesick life experiences." These stories tended to last a few minutes and related to some instance Domesick contended happened in his life. Only on occasion did Knipper find a "tenuous thread" of relevant analogy in these stories. One example of these stories was a story about Domesick's niece who worked in the gold business dealing with millions of dollars but adding nothing to the system. The "Barber with the Penthouse magazine" story concerned Domesick's 3-year old son, who would not sit still for a haircut unless he was looking at Penthouse magazine, causing his father to get him a subscription to the magazine. The "security clearance story" concerned a job interview Domesick allegedly had at the CIA while his zipper was open, causing him to later wonder what they wrote in his file about him. Knipper found no relevance to these stories which, on at least one occasion, caused even Domesick to forget what was being discussed.

As reflected in General Counsel's Exhibit 54, the subject matter of these stories bears no facial relationship to negotiations and consistently revolve around sexual or offensive references, i.e. senior employee in bordello story, missionary position story, sexual activity story, vasectomy story, the dog licking remark, intercourse v. fornication story and the favorite place for sex story. Knipper, an admittedly poor story teller, could not recall the specifics of many of the stories. Knipper did recall the general content, length, and irrelevance of these

[68] Busch did not object to the mere use of offensive language during negotiations, which commonly occurs and was used by both sides during these negotiations.

[69] Unlike the substantive matters discussed at negotiations, which Busch recorded almost verbatim in its notes, Busch did not record the stories related by Domesick. Thus, Busch's notes reflect only the general subject of each story Domesick told. While Busch's notes reflect the point during negotiations at which stories were told, they do not reflect the story's length.

stories and their effect on negotiations even where Domesick was making a tangential point. Knipper recalled discussing Domesick's storytelling during company caucuses. While some stories were occasionally amusing, most were irrelevant and offensive and disrupted and derailed the negotiating process.

On several occasions, Busch unsuccessfully raised objections to Domesick's storytelling. Domesick simply contended that was the way he spoke. Even when Telegen informed Domesick that his storytelling tactics ran afoul of the Act, Domesick disputed it:

> The Board has said nothing about my stories and metaphors. It's my speech pattern. I'm not changing my style of speaking for you. I'm a high involvement speaker.

Busch did not object to the general use of allegorical references, i.e., the carrot and the stick. Busch's objections related to Respondent's continued use of long offensive narratives which were irrelevant to negotiations, which Domesick had not used in prior negotiations. Busch did not object to stories told which had relevance to negotiations.

Knipper was cross-examined extensively over several days concerning the content and relevance of each of Domesick's stories and comments appearing in General Counsel's Exhibit 54. Frequently, Domesick "suggested" to Knipper versions of stories he did not recall on direct. Usually, this "suggestion" did not refresh Knipper's recollection. On occasion, even Domesick could not recall the stories he told during negotiations. In a classic example, Domesick suggested to Knipper that the "Barber with Penthouse magazine" story actually concerned Domesick going to the store to buy a Playboy magazine to calm his 4–5-year-old son while at the doctor's office. While Knipper could not recall this suggested story either, there was no conceivable relevance to negotiations in either one. In general, the stories suggested by Domesick during the trial were shorter than the ones Knipper recalled at the meeting. Domesick's "suggested" stories bore no relevance to negotiations even as retold. Domesick suggested to Knipper a version of the "bad idea jeans" story which typically involved a sexual reference, Knipper could not recall that story, but failed to see relevance in the story Domesick proposed. Even where Domesick suggested a story which Knipper then recalled, generally Knipper could still see no relevance of the story to the negotiations. When Domesick's retelling refreshed Knipper's recollection of the "virgin movie" story (yet another story with a sexual reference), Knipper termed that story "a classic example of what [makes] these stories so distracting."

Respondent produced no evidence during the trial concerning any aspect of Domesick's penchant for lecturing, philosophizing and storytelling during negotiations. While Domesick could "suggest" versions of stories to Knipper during cross-examination, this does not constitute record evidence, particularly when most of those suggested versions were not recalled by Knipper. No evidence was produced as to why this behavior was curtailed following the filing of the unfair labor practice charge. Neither Domesick, who did not testify, nor John Murphy, who did, gave any testimony to explain, clarify or deny Respondent's tactic of using Domesick's loquaciousness to delay and frustrate negotiations. Respondent did not deny Domesick engaged in inappropriate lectures and storytelling, nor did Respondent produce any evidence concerning the motivation for this behavior. Thus, General Counsel's evidence that Respondent used lectures and storytelling during negotiations as a tactic to delay and frustrate the negotiating process is unrebutted.

bb. Respondent's delayed presentation of its economic proposals

It is axiomatic that negotiations cannot be concluded until economic issues are put on the table. Respondent made no economic demands in its initial proposals to Busch. Respondent had made economic demands in its initial proposals in 1991. At the Union's request, the discussion of economic issues was deferred until after language issues were discussed. By December 1995, 14 months into the negotiations, Busch still had not received economic demands from Respondent.

At the November 16, 1995 drivers' meeting, Busch mentioned the lack of any economic proposals from Respondent after a year of negotiations. Respondent offered no comment. At the December 6 , 1995 drivers' meeting, Busch began pressing Respondent to produce its economic demands. This occurred in the context of discussing Busch's proposal for the immediate creation of 15 apprentice positions, which would have an economic cost to Busch. Busch had made this economic proposal, despite its economic cost, as an incentive to reach agreement on its hiring hall proposal. Respondent would not agree to the apprenticeship proposal without Busch putting its early retirement proposal on the table. Inasmuch as the early retirement proposal hinged on continuing health and welfare contributions by Busch, Busch could not cost out and make a detailed proposal without Respondent's economic demands, including health and welfare costs.

Busch negotiator Arthur Telegen began pressing for Respondent to make its economic demands, noting that they had delayed economic discussion at Respondent's request and that there had been no economic proposal in 14 months of negotiations. Domesick refused to reveal Respondent's economic demands, stating that Respondent had generally identified areas for improvement, including a wage increase. Telegen responded by again suggesting Respondent produce its economic proposals. None were forthcoming.

Busch continued during subsequent meetings to press Respondent to reveal its economic proposals. Respondent did produce its own early retirement proposal at the January 4, 1996 drivers' session, projecting a cost of $19–$20,000 per employee affected. This caused Busch to again request all of Respondent's economics, contending it was difficult to consider economic items piecemeal. Domesick responded that he did not consider his early retirement proposal an economic item. Telegen responded that it was difficult to consider this proposal without the other economic components. He repeated Busch's willingness to discuss the early retirement proposal in detail at the next meeting, but insisted they would need Respondent's complete economic proposal to do so. Domesick continued to insist his early retirement proposal could be discussed apart from other economic items. Telegen stated that Busch would give a counter proposal on early retirement, but it needed pen-

sion information and Respondent's entire package to be able to do so. Respondent did not give a reason for its reluctance to produce its economic proposals.

At the January 18, 1995 drivers' session, Telegen reiterated the need for Respondent's entire economic package. While Respondent provided the pension information relating to the proposal which Busch had requested, it did not provide the remainder of its economics. Telegen later stated: "It's hard for us to come to closure without your economics." Domesick insisted Busch had to first put money on the table before Respondent would make economic proposals, stating:

> What you should tell us is how much you will allocate to workers and to the various funds. I will assess the information and we will make up your own mind. We can't force that. So we want every benefit improved. Do we know the levels? No, because we don't know what you've budgeted.

Telegen insisted it was the union's place to specify the improvements it sought or economics would remain the same. Telegen insisted Respondent produce its economics at the next session. Domesick responded:

> You see the issue of economics as bilateral. We see it as unilateral. You have to figure and budget. But I can't believe that after 16 months you haven't done that.
>
> Telegen responded:
>
> At some point you'll make an economic proposal or you won't. Because if we don't, we'll take it that you have no economic proposals. I suppose we could say, you're on notice. The ball is in your court on economics and I'm not going to be going into an abstract discussion of our budget.

Respondent did not offer its economic proposals during the next month, covering five meetings in the two units. At the conclusion of the February 21, 1996 meeting, Telegen suggested Respondent produce its economic proposals in advance of the next meeting. Domesick said they would try.

At the March 21, 1996 meeting Telegen, in discussing Respondent's early retirement proposal, stated:

> We're ready to negotiate over economics. If this is the Union's only economic proposal we'll counter. But we expect you have some others. But we'll do it all together. At some point, I'd expect after 16–18 months, you would have made one. If you have an economic proposal, make it.

Telegen reiterated this later in the meeting: "I'd like to urge you to submit your economics if you have them. Again we need all economics for this because there is give and take."

At the March 27 meeting, Telegen urged Respondent on two occasions to produce their economic proposals at the next meeting on April 16. Respondent offered no response.

At the drivers' meeting of April 16, 1996, Respondent, for the first time, presented a partial package of its economic proposals for the drivers' unit. Respondent proposed improving the vacation package, improving the pension plan and increasing the health and contribution 12–15 percent year for 3 years, with some retroactive increase. Respondent did *not* propose a wage increase on April 16, though it stated its intention to do so. Telegen stated that Busch could not counter on economics without wages. Domesick would not produce them.

Respondent finally made its wage proposal in the drivers' unit at the May 21, 1996 drivers' meeting, 19 months after the start of negotiations. Respondent did not produce *any* economic proposals for the plant unit until the meeting of July 3, 1996, when it presented a complete package.

Respondent's refusal to produce its economic proposals until 19–21 months after the start of negotiations and 5–7 months after Busch began insisting on their production adversely affected the negotiations. Without these economic issues being on the table, the negotiations could not be brought to closure. While Busch had stated it intended to improve the employees' economic package, it could not cost out and present its own proposals without knowing what Respondent was seeking. Without Respondent's health and welfare proposal, Busch could not calculate the cost if either parties' early retirement proposal. Busch was further hindered in this regard by Respondent's refusal to provide health and welfare information, discussed previously. Busch was not able to present its own economic proposals until September 11, 1996, when it presented its complete package.

cc. Focusing negotiations on the sale of the business

Motivation for Respondent's bargaining behavior can be found at the outset of negotiations. As noted above, Respondent's initial proposals in each unit, prior to its receipt of Busch's proposals at the first negotiating session, contained a major rewriting of the contractual successorship clause which would be more advantageous to Respondent in the event of the sale of the business. Respondent then focused the bulk of the discussion at the preexpiration bargaining sessions on the sale of the business, rather than on substantive contract proposals. Respondent made clear that it wanted Busch to sell its business to an entity more agreeable to Respondent.

At the first negotiating session, Busch presented its proposals and discussed its intentions concerning negotiations. Busch admitted that it had an ambitious agenda and was seeking major operational changes in the way the Branch operated in order to respond to industry pressures, manage its work force and improve customer service.

Schmitz described Busch's agenda to Respondent. Schmitz told Respondent that, if it was unable to attain the changes it desired through negotiations, Busch was prepared to sell off the Branch. However, Schmitz stated Busch did not desire to sell and would negotiate in good faith to obtain a new collective-bargaining agreement. Schmitz told Respondent Busch was *not* seeking any economic concessions and, in fact, was prepared to improve the employees economic package. Attorney Domesick's response was notably blunt, with overtones from Respondent's Burke experience:

> From the Union's point of view, we would like to see you sell the Branch. But we want to have a smooth succession to the next employer . . . . Would you as a Union want to battle a vastly rich corporation or a small time businessman. I must say, I'd rather deal with the local busi-

> nessman. . . . So maybe we should focus our efforts in the smooth transfer of the Branch . . . Maybe we should use our ability to insure a smooth transition and apply our union resources in and out of the marketplace, in politics with A-B. In the same way we can have a positive influence. But we can also be a force for evil like a horror movie. Vincent Price like. There is truth in that. . . . You're selling something people want, a cash cow, but they have to hire our workers. Then we can take care of our relationship. *A new owner can thank you for getting a distributorship. And we can make concessions to a new owner."* [Emphasis added.]

Domesick later continued:

> This is not the jewel in the crown of A-B. We are very little in the A-B company. We're small in this corporate giant. We want someone who cares. I want this to be someone's who thinks it is the "jewel in the crown" who wants to save it for their grandkids.

Thereafter, Respondent continually urged Busch to sell the Branch, taking up a substantial amount of negotiating time in the sessions before contract expiration. Schmitz attempted unsuccessfully to convince Respondent it wished to keep the Branch and to discuss issues. Domesick continued to emphasize that the proper focus of negotiations should be on succession to a new employer, a theme he repeatedly struck in the next several sessions.

In what was a tense first meeting, Domesick insisted that the issue of successorship be handled first, stating, "We need to put the horse before the cart." Schmitz objected to no avail that Respondent had yet to even review Busch's proposals before taking this position. Domesick insisted that successorship come first to give security to the bargaining unit. Domesick then stated, in a serious and sincere manner:

> This is where the price of your distributorship is, but you may try to sell the business without the labor contract, but I would not recommend that and hope that you won't because, Caryn, put your pen down, there will be warfare. We'll blow it up. I know I can't say that. But we will.

This threat[70] produced a stunned reaction among those present. Coming during a tension filled meeting, it was taken as serious and sincere. This threat introduced even greater tensions into the early negotiations.

Tensions were further heightened by a threat to Pat Knipper's family made during the November 3, 1994 bargaining session.[71] These threats were taken seriously by Busch, particularly in light of violence by Respondent during the 1983 strike at Busch and during the Burke dispute a few years earlier.

Domesick continued to emphasize his desire for a sale at the next meeting on October 18, 1994, which was the first plant meeting. Domesick stated:

> I can't deal with a fanatic. So where's the future for our people? It's got to be with another Employer. It's not A-B. I'm assured of that and of an uncertain future. I don't see a new Employer won't have value to us. You're being here tells me this.

Busch continued to tell Respondent it desired to negotiate a contract and not to sell the Branch.

At the next meeting on October 24, most of the meeting centered on Respondent's insistence of discussing the sale of the business. Knipper angrily objected to Respondent's constant refrain during three meetings of its desire for a sale of the business, stating:

> You are saying the fucking place is sold. I'm trying hard to keep from selling the place. And all you can say is I'm not telling the truth. We've had enough of this. We can sit around all day and listen to you. We have told you there are two issues in this section. If you don't want to address those issues now, we can talk all day. But tell us you have no counter and let's move on. You keep saying it's sold and I don't believe it's not sold. Well its not fucking sold! So you come and tell us something.

Knipper's concern was that, if Respondent continued to avoid negotiating contractual issues, no contract would be reached and the Branch would be sold. Despite Knipper's outburst, the issue of the sale consumed the remainder of that meeting. Thus, the majority of the discussion in the first three negotiating sessions concerned Respondent's desire that the Branch be sold to a small businessman, rather than either party's contract proposals.

This desire for a sale of Busch's business continued to be uppermost in Respondent's thoughts thereafter, even away from the bargaining table. On February 24, 1995, Busch held a "Chuck's Bar and Grille" promotion in conjunction with WZLX-FM at the Union Street Restaurant in Newton, Massachusetts. Respondent conducted a demonstration at the promotion as part of its consumer boycott campaign.

Frank Curtis, Busch's operations manager, went to the Union Street Restaurant promotion where he encountered John Murphy. Murphy was in a uncontrollable angry tirade. He swore at Curtis and threatened to sue him. After a few minutes, Murphy calmed down and became almost apologetic. Referring to Pat Knipper and Mark Wahlgren, Busch's director of sales and operations, Murphy stated, "I've worked too hard for 15 years to get the Union where it is. I'm not going to allow these New Jersey assholes to come in here and take it all away from me." Curtis responded that he and Murphy had dealt with each other for years, and it now came down to Murphy threatening him in a bar. Murphy responded, "Sell it. Sell it now, Frank," referring

[70] This threat was alleged in a prior unfair labor practice complaint against Respondent, which settled after 4 days of trial. This evidence, therefore, is offered as background. The "Caryn" referred to by Domesick in the threat is Attorney Caryn Fine, a member of Busch's negotiating team and one of its notetakers during negotiations.

[71] This threat was also settled as part of the settlement agreement in GC 4.

to the distributorship. Curtis told him to save it for the negotiating table.[72]

Following its filibuster concerning the sale of the business, Respondent persisted in spending an extensive amount of time on other, less important issues in the negotiations. These included the Family Medical Leave Act (FMLA), the restoration of dues checkoff, an interim agreement and bereavement leave.

dd. The FMLA negotiations

Busch considered the issue of the recently enacted Family Medical Leave Act to be a secondary issue in the negotiations. The statute is fairly detailed in its requirements and has only minor mandatory areas for bargaining. In addition, employees in both units already had a leave of absence provisions within their collective-bargaining agreements concerning certain situations covered by the FMLA. It had taken less than an hour for Anheuser-Busch and the International Brotherhood of Teamsters to negotiate FMLA language at the national level covering the entire brewery system. While Busch proposed FMLA language in its initial proposals in each unit, Respondent made no FMLA proposal in either unit.

Thus, Busch was surprised that Respondent chose to spend virtually the entire plant meeting of November 9, 1994, the last meeting before contract expiration, on FMLA. Respondent proceeded to spend the two subsequent plant meetings, on February 1 and 10, 1995, on the FMLA issue. Thus, three of the 17 plant meetings held in the first 2 years, totaling 14 of the 50 hours spent in those negotiations, were spent on the FMLA issue. They were the only meetings held in the plant unit during a 3-month period. Thus, in the 3 months between November 9, 1994 and February 10, 1995, the parties negotiated *solely* on the FMLA issue at Respondent's insistence.

Respondent negotiated the FMLA issue by posing a seemingly endless string of hypotheticals for discussion concerning Busch's proposal but without any resolution. Respondent's highly detailed, belabored negotiations on this issue is captured concisely during Domesick's cross-examination of Knipper concerning the FMLA discussion of November 9, 1994. This extensive, time consuming cross-examination accurately captures the nature of the negotiations, and the lack of resolution of the issue.

Respondent was unable to explain its position on FMLA when requested by Busch, frequently changing its position. During the negotiations, Busch pressed Respondent to produce a counterproposal. At the end of the second meeting, Respondent stated that it had a counter, but refused to produce it until the next meeting. When that proposal was then produced, it lacked essential elements concerning the length of leave and them continuation of health and welfare benefits.

Throughout the FMLA portion of negotiations, Respondent played games with Busch at the table designed to prolong the discussion and avoid any possible agreement. These games included refusing to answer a question concerning its position regarding doctor certification for leave, thereby causing 2 hours of negotiating time to be devoted to the issue. Respondent took shifting positions on whether there was even any need to negotiate FMLA language or simply let the statue apply, again seeming to prefer to prolong the debate rather than negotiate the issue.

Schmitz brought a copy of the FMLA provisions of the National Master Teamster Agreement to the February 1, 1995 meeting. Respondent had asked to see them when they came up at an earlier session. On February 1, however, Domesick refused to look at these provisions unless Busch offered them as a proposal.

Throughout the February 1 meeting, Respondent insisted on discussing Busch's proposal, refusing to propose FMLA language of his own. When Schmitz asked to see Respondent's proposal, Domesick responded: "Are you willing to agree to my proposal without seeing it?" Obviously, Busch could not agree with such a tactic. Domesick thereafter successively suggested the FMLA leave be set at 36 weeks, then at longer than 12 weeks and then at 52 weeks while *refusing* to actually propose any of these standards, preferring to work only from Busch's proposal. Schmitz was simply unable to get Domesick to commit to a position. This discussion continued thereafter with Domesick "suggesting" 52 weeks of leave, but refusing to propose it, further suggesting, without committing, that the present contract would suffice for an agreement.

Respondent continued to prefer to debate concepts, rather than proposals, by refusing to take a position on medical certification. In the alternative, Respondent threatened lawsuits from employees against Busch in the absence of an FMLA agreement. Domesick continued to refuse Schmitz' requests that he make an FMLA proposal.

Domesick thereafter clarified Respondent's tactics here. While Respondent refused to make any proposals on FMLA, insisting on endless discussion of concepts, it would allow Busch no such leeway. Rather, Domesick stated:

> You haven't proposed that. Until you propose it, it's not binding. This isn't Madison Avenue. *Until you modify your proposal, everything I say is just puffery*. By that I mean, until you propose it, it's all academic, all speculation. That's what I mean by puffery in this instance. [Emphasis added.]

It is evident that the bulk of Respondent's negotiations on this issue were puffery.

Busch solicited Respondent again for its proposal towards the end of the February 1 meeting. Domesick, while admitting he had an FMLA proposal, refused to give it or even describe it until the next meeting, claiming he may want to go over his notes.

Domesick did, indeed, produce a counterproposal at the next session on February 10. However, he conceded his proposal did not contain essential items concerning the continuation of health and welfare benefits during FMLA leave. This was a vital component of the issue and had been the subject of much of the prior meeting's debate, yet Respondent chose to make no

[72] While Murphy was called as a witness by Respondent, he did not rebut this statement. An adverse inference will be drawn from Respondent's failure to rebut this evidence.

proposal concerning it. Respondent's offered reason for this decision was that the proposal related to economic issues.[73]

When discussing Respondent's FMLA proposal, Domesick was unable, or unwilling, to explain key components of it. Domesick refused to say whether the proposal was simply coextensive with the government FMLA regulations or had a broader application. As Knipper testified, "It's difficult to negotiate contractual language when you don't know what it means."

To expedite negotiations, Schmitz had offered Respondent several counterproposals on issues other than FMLA at the February 10 meeting. Domesick resisted accepting them, claiming he wanted to "dedicate his thoughts to FMLA." Schmitz continued to insist his counterproposals be received. After a time consuming discussion, Respondent accepted Busch's counterproposals.

Respondent insisted on discussing the FMLA proposal for all three plant meetings held between November 9, 1994, and February 10, 1995, a period of 3 months and 14 hours of negotiations. Curiously, there were no further discussions of FMLA after the February 10 meeting. No agreement was ever reached on that issue. Respondent never made proposals concerning the length of FMLA leave or continuation of health and welfare benefits, even in its belated offer of economic proposals.

ee. The dues-checkoff issue

Respondent "ground negotiations to a halt" at the following meeting on March 21, 1995, by insisting on spending the entire meeting attempting to persuade Busch to reinstate dues checkoff. Busch had continued to checkoff union dues during the first 4 months after contract expiration. However, it had terminated this practice in early March only after Respondent had claimed in a related court proceeding that an implied-in-fact contract existed between the parties because Busch continued checkoff.

So incensed was Respondent concerning the termination of dues checkoff that Domesick made several threats during the March 21 meeting to further frustrate negotiations unless checkoff was restored, as described above.[74] This series of threats culminated with Domesick stating: "We'll negotiate dues checkoff and union security 'til the cows come home!"

Because of Respondent's tirade concerning dues checkoff, there was no discussion of any substantive proposals on March 21, effectively delaying negotiations. Reinstating dues checkoff continued to be an issue at the next plant meeting on April 4, 1995, to the exclusion of other substantive proposals except an interim agreement. Thus, two negotiating sessions were used for Respondent to vent its misplaced anger at the termination of dues checkoff rather than to engage in substantive negotiations.

ff. The interim agreement negotiations

Respondent's desire to reinstate checkoff led to the concept of an interim agreement, of which that would be one element. This concept was first raised by Schmitz at the March 21 drivers' meeting. As proposed by Schmitz, the interim agreement would require Respondent to agree to Busch's hiring, scheduling, attendance and nontraditional work proposals as a quid pro quo in return for Busch's agreement to reinstate union security and dues checkoff, as well as a no-strike clause containing a 10-day notice. Busch's concept was to reach an interim agreement on issues which were important to each side. The issues Busch proposed as part of the drivers' interim agreement were "meaty" in the hopes of getting the negotiating process moving.

Domesick responded at the April 4 plant meeting by offering his version of an interim agreement. This was merely a written proposal to extend dues checkoff, with no attendant benefit to Busch. On April 28, Respondent made the same proposal in the drivers' unit. Both were rejected by Busch.

Busch proposed a set of different elements for a potential interim agreement in the plant unit at the April 4 meeting than it had in the drivers' unit on March 21. The issues Busch proposed as part of the interim agreement in the plant unit were agreement to four Busch counter proposals—the holiday trade and buy back proposal, promotions from within, 1-day vacations and higher compensation for out-of-unit work. With the exception of the holiday trade and buy back, each of these issues was originally proposed by Respondent. All four issues were enhancements to the bargaining unit. In return for these, Busch would agree to reinstate dues checkoff with a no-strike provision with 10-day notice. After discussion, Busch further agreed to include arbitration as part of the interim agreement.

Discussion of the components of the plant interim agreement then took up much of the discussion in the meetings leading up to August 11, 1995. The proposals discussed were all Respondent's proposals. At the drivers' meeting on August 11, the parties reached agreement on the 1-day vacation proposal, which had been an issue in both units and an element of the proposed plant unit interim agreement. Upon signing off on that agreement, Domesick stated: "If memory serves me right that leads us to a happy point. A point where we can agree to this Interim Agreement." Domesick then produced a previously prepared written document. This "Interim Agreement" consisted of union security and checkoff, arbitration, no-strike/no-lockout language, training language previously agreed upon and the 1-day vacation proposal. These latter proposals related solely to the plant unit.

Schmitz rejected this document as it contained none of Busch's elements of the proposed drivers' Interim Agreement. Domesick began to read from the minutes of the April 4 plant unit negotiations, describing the elements of the interim agreement discussed there. He contended this discussion modified Busch's proposed drivers' interim agreement. Busch responded that the negotiations in each unit were separate at Respondent's insistence and, thus, there were also separate proposed interim agreements. Domesick admitted the negotiations were separate, a fact which he did not want to change. He continued to insist, however, that an interim agreement had been reached in the drivers' unit. Busch continued to dispute his assessment.

[73] It should be recalled that Busch had been requesting Respondent's economic proposals since December 1995, yet received none until April 16, 1996.

[74] Respondent's conduct during the March 21, 1995 meeting was fully detailed in the previous section concerning its failure to meet with Busch.

Domesick demanded to see Busch's notes as a means of resolving the dispute. He insisted his own notes were in clear support of his position. Domesick repeatedly insisted upon seeing Busch's notes, offering to see his own notes only upon seeing Busch's. Schmitz did not have Busch's notes with him and said he would consider the request.

This dispute about the Interim Agreement consumed the remainder of the August 11 meeting. Busch believed Respondent created a deliberate misunderstanding to frustrate negotiations. Busch did not see how Domesick could be confused that there were two separate proposed interim agreements, containing radically different elements, when Respondent had insisted on separate negotiations. Schmitz codified Busch's position in an August 17, 1995 letter to Domesick. Schmitz noted that he had told Domesick at the July 13 drivers' meeting that they were "miles away" from an interim agreement. Though agreement had been reached on two of Respondent's proposals, none of Busch's issues had been addressed. In the July 13 meeting, Respondent had refused to even discuss Busch's hiring proposal, one of Busch's major components of an Interim Agreement. Schmitz suggested negotiations turn to discussion of Busch's elements of an interim agreement.

Despite Schmitz' letter, the debate about whether an Interim Agreement existed continued to consume negotiating time at the next two negotiating sessions on September 19 and 28, 1995. On September 19, the parties again discussed the elements of the Interim Agreement for most of the meeting. At the September 28 meeting, Domesick refused to discuss the employer's attendance or hiring proposals, insisting on only discussing the Interim Agreement. Of course, Busch's attendance and hiring proposals were a component of the proposed drivers' interim agreement. As the argument raged, Domesick then refused to discuss any other matters until the Interim Agreement issue was resolved. Busch persisted that it wanted to discuss the hiring hall. Telegen even granted Domesick's request to inspect Busch's notes as a means of resolving the debate. Respondent never took him up on the offer.

A review of Respondent's own notes clearly eliminates any conceivable validity to Domesick's contention concerning the elements of the interim agreement. Had Domesick, in fact, been looking at Respondent's notes during any portion of the prolonged discussion, he would have seen that Busch stated that its hiring and attendance policies had to be part of the drivers' interim agreement. Similarly, Respondent's notes of the April 4 plant unit confirm Schmitz specified the four separate proposals Busch sought for inclusion in the plant interim agreement. Busch's notes on these points were in conformance with Respondent's. It is significant that Domesick perpetuated this debate over several meetings without ever producing or, indeed, inspecting his own notes.

At the October 17 plant meeting, Busch tried unsuccessfully to finalize an interim agreement in the plant unit. Respondent would not agree.

No interim agreement was reached in either unit, despite extensive negotiations from March through October 1995. Busch believed this series of negotiations was another contrivance designed to delay negotiations and avoid agreement. The extensive debate about whether an Interim Agreement had been reached typifies this strategy. Because of the difficult issues in the drivers' negotiations, Busch was not surprised that no interim agreement could be reached in that unit. They were surprised that Respondent could claim that the hiring and attendance policies were not part of the proposal. Busch was surprised that Respondent would not agree to the interim agreement in the plant unit. Unlike the drivers' proposal, all of the elements in the plant agreement were enhancements to that unit, including dues checkoff. Busch believed that, politically, Respondent could not reach agreement in the plant unit without one in the drivers' unit because of the effect on a potential strike.

gg. Bereavement leave

Respondent used the issue of bereavement leave to delay and frustrate negotiations. The parties had fairly broad bereavement leave language in both contracts. Respondent had, as one of its initial proposals in each unit, sought to expand that coverage to include an employee's "domestic partner." Busch did not see this as a major issue. As the negotiations developed, it became clear that Respondent used this issue not to benefit employees, but to insert a political statement into the collective-bargaining agreements.

At the start of the September 28, 1995 driver's meeting, 1 year into the negotiations, Respondent first offered specific language on its bereavement leave proposal, which included an "Affidavit of Domestic Partnership." The affidavit required employees to declare, under penalty of perjury, the nature of their personal relationship to be eligible for the bereavement leave benefit. While Busch was not opposed in principle to the expansion of bereavement leave to include "domestic partners," it was concerned about the potential personal and financial ramifications on employees required to execute this affidavit. The affidavit could be viewed as an "outing" provision for gay employees. Busch counterproposed a one time 3-day bereavement leave for any significant person in the employee's life, whether or not they were a "domestic partner." This proposal eliminated the need to execute an affidavit. Domesick rejected Busch's counterproposal, preferring the affidavit, stating:

> It's more appropriate to us, even if it doesn't violate a statute, but it sends an appropriate message that love comes in more than one form. The affidavit is no less a memorial than a marriage certificate. Love is not represented by a piece of paper, but by many other things.

Thereafter, Domesick confirmed Busch's concern, describing the proposal as a "political issue." When Busch stated it was not the company's concern whether its employees were gay or straight, Domesick stated, "It should be."

Bereavement leave was discussed at negotiating meetings over 5 or 6 months. On January 4, 1996, Respondent offered a counterproposal which essentially substituted the term "spousal equivalent" for domestic partner, but retained the affidavit. Busch reiterated its objection to the proposal as an invasion of the privacy of employees. In the subsequent discussion, Busch objected to the affidavit as constituting an outing provision for gay employees. Domesick confirmed this legitimacy of this concern, stating:

> I have a number of gay friends and there's no embarrassment. But they would appreciate this. Why should they be biased against those who don't have the strength to declare themselves. . . . No, we respect the right to privacy, but if you don't declare it they get no benefit.

Respondent objected to Busch's counterproposal, which offered broader coverage for the unit. Domesick stated, "We don't want to spend the company's money this way. We don't want to spend the limited reserves this way." Curiously, Busch had raised no concern about the cost of this proposal.

During the February 20, 1996 meeting, Busch attempted to learn the origins of Respondent's bereavement leave proposal in order to find a common ground for agreement. Respondent admitted it had not polled the unit concerning its desire for the proposal, but refused to say whether it was aware of any members who would benefit from it. This caused Busch to assume there was no benefit to members in the proposal. Rather, Respondent's rationale was simply to give the nondiscrimination clause its broadest application. The irony of this position is that Respondent's own health and welfare plan does not extend coverage to spousal equivalents or domestic partners.

During the course of the negotiations on the bereavement leave issue, Knipper had observed Respondent's negotiating team, except for Domesick and Murphy, with their heads down, laughing and giggling whenever the proposal was discussed.

Discussion of bereavement leave continued during subsequent meetings. Ultimately, agreement was reached in both units on a proposal quite similar to Busch's original counter proposal on September 28, 1995. No affidavit was included. The lengthy negotiations which occurred, therefore, did not produce a major change in the result. The nature of Respondent's proposal, its unwillingness to demonstrate any employee support for it and the behavior of Respondent's negotiating committee caused Busch to conclude that the negotiations over this proposal were not designed to benefit the unit but for Respondent to make a political statement in the collective-bargaining agreements. Extensive negotiations over a minor issue were typical of the detailed bargaining strategy.

hh. The hiring negotiations

While Respondent insisted on lengthy negotiations on several minor issues such as FMLA and bereavement leave, it avoided negotiations on issues of major concern to Busch, such as its hiring proposal. Even when substantive negotiations did, on occasion, commence on a major issue, Respondent frustrated them with regressive proposals.

Busch's proposal to eliminate its exclusive reliance on Respondent's hiring hall was one of its major proposals in these negotiations. By its proposal, Busch sought the right to hire spare employees directly from any source, including Respondent's hiring hall. Busch's hiring proposal was discussed early in the negotiations, but primarily to answer Respondent's questions on how it would work. In depth negotiations were not conducted at that time.

By September 1995, Busch began insisting that discussions begin on its hiring proposal. Respondent resisted those requests. At the September 28, 1995 drivers' session, Telegen tried several times to turn the discussion to hiring. Domesick, frequently insulting Telegen, refused, insisted on discussing the Interim Agreement.[75] Respondent refused to discuss the hiring issue for the entire meeting on September 28. Telegen concluded by requesting that Respondent bring a hiring proposal to the next meeting.

From the outset of the next meeting on October 24, Telegen persistently solicited Respondent's counterproposal on hiring. Domesick insisted on discussing only the holiday issue. Even when Telegen relented and gave a counterproposal on holidays, Domesick refused to discuss hiring, stating: "I'm not gonna talk about hiring until we reach agreement on holidays." Domesick then contended he did not know how Busch's hiring proposal would work. After it was explained, Telegen initiated a lengthy discussion attempting to learn how the existing referral system was operated by Respondent. As previously described, Telegen was wholly unsuccessful in obtaining information from Respondent concerning its own referral system. To advance negotiations, Telegen proposed arbitrating the issue of hiring hall and adopting Busch's proposal for a trial period. Both offers were rejected. Throughout the meeting of October 24, Respondent continued to refuse to give a hiring counterproposal. The meeting concluded with Telegen stating he would assume Respondent did not have a hiring counterproposal if one was not received at the next meeting.

Telegen confirmed his position in a letter to Domesick on November 2, 1995. The letter explained the importance of the issue to Busch, how Respondent's refusal to provide relevant information had handicapped negotiations and stated that, if no counterproposal from Respondent was forthcoming at the next meeting on November 16, Busch would assume Respondent had no hiring counterproposal.

On November 16, 1995, for the third consecutive drivers' meeting, Busch attempted to get Respondent to discuss Bush's hiring proposal. Respondent did produce a counterproposal. The counterproposal stated Busch "will continue to give first consideration to applicants referred by the Union." Busch found this to be no counterproposal at all, merely a rewording of the existing practice.

In the discussion of Respondent's counterproposal, Domesick proposed the concept of a slate of employees from which spares would be hired. Busch was willing to consider this concept. While the slate was not a concept Busch originally considered, it became a viable compromise as the negotiations continued. Domesick himself later labeled the concept of a slate, or spares roster, "a good idea." Respondent appeared agreeable to the concept. The remainder of the November 16 meeting concerned negotiations of the spares roster concept.

Based on the positive discussions concerning the spares roster, Busch presented a counterproposal on the spares roster at the next drivers' session on November 29. Essentially, the proposal would have allowed Busch and Respondent to each select

[75] When Telegen asked to get away from the interim agreement, Domesick, totally unprovoked, stated: "This is not high school. You can't remake your youth at these meetings. You will still be picked last on the team, the cheerleaders won't like you and you will need approval." Later Domesick stated to Telegen: "You're trying to work out your relationship with your father here by seeking the approval of Pat [Knipper]."

an equal number of employees for the spares roster, from which spares would first be hired. The spares roster proposal was discussed for virtually the entire November 29 meeting. Busch found that the negotiations during these two meetings to be constructive and felt that the parties were close to reaching agreement on the concept of a spares roster.

At the next drivers' session on December 9, 1995, however, Respondent decided it no longer wished to talk about the hiring issue, preferring to set it aside for other issues. Domesick stated that 2 months was too much time for that issue. Telegen contended they had only spent about 3 hours discussing the matter at the table.[76] Domesick continued to refuse to discuss the hiring issue. Finally, Domesick offered a counterproposal on hiring, but refused to discuss it that day.

Respondent's counterproposal was merely a rewording of its first hiring counterproposal, essentially leaving the existing referral system intact. It made no mention of the spares roster concept, which had been discussed over two meetings. Busch found this a regressive proposal and so informed Respondent.

There were no further negotiations concerning the hiring issue, either on December 9 or thereafter. No agreement was ever reached on the hiring issue.

Busch viewed what occurred during the negotiations on the hiring issue as an example of detailed bargaining. Respondent devoted negotiating time to the issue, admittedly productively for a period of time. When an agreement came near, Respondent then deliberately blew up the process with a regressive proposal, rendering the time spent at the table a "waste of time."

ii. Other game playing tactics

Respondent engaged in a variety of other "game playing" tactics during the negotiations. These included refusing to make or explain proposals and counterproposals and reneging on prior understandings. All had the effect of delaying negotiations and frustrated any possible agreement.

At the drivers' meeting of November 3, 1994, the parties were discussing Busch's proposal to swap two existing holidays for 2 personal days, with a buyback option for unused personal days. During the discussion, Respondent raised several objections to the proposal. Respondent refused, however, to make a counterproposal based on any of its objections. Rather, it preferred to simply raise issues to discuss. Domesick stated: "I throw these things out. I could propose the moon. I don't have all the answers. Most though." Domesick refused each of Schmitz' requests to make a proposal, stating at one point that the only way Respondent would agree to Busch's proposal on holidays was for Busch to remove all of its other proposals from the table.

In the drivers' meeting of November 10, 1994, the parties were discussing proposals concerning route assignments and the meaning of certain language contained in the collective-bargaining agreement. Domesick claimed that Schmitz did not understand the meaning of the language, since Schmitz had not been present when it was drafted. However, when Schmitz pressed Domesick for his understanding of the language, from which an agreement on its meaning could be reached, Domesick refused to explain his own understanding.

Similarly, during the April 4, 1995 plant meeting, a discussion occurred concerning Respondent's unwillingness to use a federal mediator or make counterproposals to advance negotiations. Domesick stated that Respondent had prepared about 40 counterproposals, but refused to share them until "the appropriate time." They were never forthcoming.

Later in the same meeting, Domesick refused to take a position on whether arbitration had to be part of the proposed interim agreement. He further refused to discuss multiple components of the interim agreement at the same time, contending that amounted to "horsetrading," which he refused to engage in. "Horsetrading," which is commonly done in negotiations, had been engaged in by these same parties in the 1991 negotiations.

One of Busch's key proposals involved the creation of an attendance policy. At the outset of negotiations, Busch had no attendance policy. Employees had no obligation to appear for work or to call in if they were going to be absent. Employees could also appear for work and choose not to work if they did not like the available assignments. Each of these absences were known as "book offs." Under the existing system, employees suffered no penalty for "booking off" other than the loss of pay for the hours not worked.

Busch made clear in its initial proposal that it intended to eliminate book offs and establish a negotiated attendance policy under which employees were required to report for work daily. The substance of this attendance proposal was discussed over 8–9 bargaining sessions. During these negotiations, Busch made several counterproposals to Respondent designed to implement an attendance policy and eliminate bookoffs.

Respondent had counterproposed on this issue, including the concept of nontraditional discipline for attendance problems. Busch considered this to be a bridge to an agreement. Busch felt real bargaining was occurring on this issue and that agreement was possible. Throughout the discussions, however, Busch maintained that the cornerstone of any agreement was the elimination of bookoffs. Without eliminating bookoffs, where employees can fail to appear for work without penalty, a real attendance policy was not possible.

The parties continued discussions of Busch's attendance proposal at the May 23, 1996 drivers' meeting, occupying the entire meeting. At the outset, Busch made another counterproposal. Part of the discussion related to Respondent's proposal that there had to be a willful refusal to report to work to be subject to discipline and the standard to be applied for defining excessive absenteeism.

During this discussion, Telegen stated that the parties had agreed that bookoffs would no longer be allowed. Domesick did not respond. When Telegen pressed Domesick to confirm his understanding that there had been an agreement to eliminate bookoffs, Domesick said that he could not talk on the issue. Domesick then said that he had not contemplated whether bookoffs would be considered a valid reason for employees not to report for work under the attendance policy. This position undermined Busch's entire proposal. Telegen accused Dome-

[76] At the Respondent's insistence, the parties had spent three meetings over 3 months, a total of 14 hours, negotiating about the FMLA proposal in the plant unit.

sick of bargaining in bad faith and stated he had "pissed away the day." Domesick, somehow taking umbrage at the comment, terminated the meeting.

Busch found this to be a further example of Respondent's game playing. Respondent had understood from the outset that Busch intended to eliminate bookoffs as part of an attendance policy. The negotiations had proceeded for 18 months on this issue with that understanding. When agreement was drawing nearer, Respondent suddenly contended bookoffs were still contemplated as part of an attendance policy, causing the negotiations on this issue to be "trashed." No agreement was ever reached on an attendance policy.

Further typifying Respondent's game playing in negotiations was its patently false objections to the use of "bad" language at the bargaining table. Though perhaps regrettable, the use of obscenities has a long and honored history in negotiations and is quite commonplace. Nevertheless, in one session, Attorney Domesick claimed umbrage at Schmitz' use of the word "bullshit." Domesick's umbrage is belied by his own and his committee's use of the word "bullshit" (G.C. 38(j), p. 29 (John Murphy); G.C. 38(l), p. 36 (James Hoar); G.C. 38(q), p. 23 (Domesick); G.C. 38®, p. 28 (Domesick).) Domesick engaged in even more egregious use of language during one session, calling Schmitz a "schmuck" and a "putz," stating that talking to him was like "talking up the ass of a dead horse." When Schmitz objected to these characterizations, Domesick stated, "You come to the table. You have to accept robust language." To this latter statement, there may be truth, which further emphasizes the game Domesick was playing by his previous objections.

Respondent presented no evidence whatsoever in response to the allegations that it engaged in unlawful "game playing" at the bargaining table designed to delay and frustrate the negotiations. These allegations, therefore, remain unrebutted and the facts presented by General Counsel are credited.

jj. Respondent's burdensome information requests

In 1991, Respondent made no information requests of Busch relating to collective-bargaining negotiations.[77] An essential component of "detailed bargaining," as described in *The Labor Page* by John Murphy, is "making detailed requests for information and analyzing each answer." In the 1994 negotiations, Respondent made *eight* requests for information related to bargaining in the first 9 months of negotiations. While certain of these requests were facially related to collective bargaining, seldom did they result in any proposals by Respondent at the table. These requests did, however, require Busch to spend a considerable amount of time and generate a considerable amount of paper complying with the requests. The lack of substantial responses at the table to the information received caused Busch to conclude that the primary purpose of the requests was to harass Busch, causing it to waste time and divert attention from the negotiations. Respondent ceased making this type of information request after Busch filed its unfair labor practice charge.

Respondent's request for health and safety information appeared to be copied from a form used in another industry. It contained questions wholly inappropriate to Busch's warehouse and distribution operation.

Respondent sought the generic names of all chemical substances at the facility, requiring production of over two inches of material-data safety sheets. These had never before been requested by Respondent and were already available in the plant on a daily basis. In items 3 and 4, Respondent also sought the results of all clinical tests on all of these substances, going so far as to identify third party sources where Busch might seek to obtain them. Busch performs no such testing, which was well known to employees and Respondent. Busch was given an estimate that there would be over one million pages of documents responsive to this request. Requesting this information appeared to be no more than harassment.

Despite this, Respondent renewed its request on item 4, seeking to have Busch obtain these studies from third parties. Busch refused to go through this exercise, as it had no greater access to the information than Respondent. Respondent then abandoned its request.

Item 5 sought health related information from the employees' health insurance carrier. Since unit employees are covered by a health plan administered by Respondent, with John Murphy as administrator, Respondent already possessed this information and only had to ask itself for it. Responding to the remainder of the request required producing a stack of OSHA 200 forms and over two inches of first reports of injury forms. This task was totally duplicative as Respondent was already regularly furnished these forms on a monthly basis.

Item 6 sought contaminants monitored by the company. This request was further harassment since Busch's operation neither uses nor monitors contaminants.

Item 8 sought information concerning work areas which exceed certain heat standards. Busch's facility refrigerates, and does not heat, its beer, a fact obvious to those employed there. Similarly, there is no issue at the facility concerning heat disease as requested in item 8.1. These items, above all, appeared the most irrelevant.

It took Busch about 10 hours of managerial and secretarial time to comply with this request, producing over 5 inches of responsive documents. Busch viewed this request as part of detailed bargaining. The requests were generally unrelated to Busch's operation. There was no evidence Respondent used any of Busch's responses in any way during negotiations. Respondent made no proposals based on this information. It simply wasted Busch management's time in responding to it.

Respondent requested Busch's organizational chart, job titles and descriptions and information on each incumbent. This information had never before been requested by Respondent. Complying with this request took a total of about 7–9 hours. While relevance for such a request could exist, Respondent made no apparent use of the information and no proposals based on it during negotiations.

Respondent made a detailed information request concerning the company's policies apparently in relation to the Americans

[77] While Respondent did present evidence of information requests it made during that period, none of those requests directly related to the contract negotiations.

with Disabilities Act. Respondent later repeated its request, seeking the same information concerning employees outside the bargaining unit. Respondent did not explain why such information was necessary. While the ADA was an issue discussed during negotiations, it was not clear Respondent made use of the information it received, which took several hours to compile.

Respondent's next information request was for Busch's financial records in order to "prove [Busch's] poverty plea." Busch referred to this as the "gotcha request." Based on earlier comments by Domesick, Busch believed he was lying in wait for the magic words "can't afford" to be stated by Busch so he could make this request. The request arose out of a discussion at the February 3, 1995 drivers meeting.

The discussion at that time did not concern economics[78] but, rather, Busch's apprentice proposal. Mark Wahlgren was discussing the issue with James Hoar. Neither was their parties respective spokesman. Wahlgren began a comment with the words "the company can't afford . . ." but was interrupted by Domesick and not allowed to complete his thought. Domesick began gleefully waltzing around the room saying that the company had said the words and now Respondent would get their records. He continued this way for several minutes. Schmitz objected to no avail that he was chief spokesman and had never said the company could not afford to pay the employees. Domesick stated he would make the request and file a charge with the Board if the Company refused to comply. The discussion then turned to other matters for the remainder of the meeting.[79]

Domesick fulfilled his prophecy by filing his information request, which Busch rejected. Domesick renewed his request, contending in support that, immediately following Wahlgren's comment, Schmitz had "hustled the company's bargaining team from the room, ending that day's discussion." Domesick's imaginative version of the events at the February 3 meeting is not supported by Busch's notes. Respondent produced no testimony to dispute the accuracy of Busch's notes.

Five months later, as predicted, Respondent filed an unfair labor practice charge on this matter against Busch. The charge was later withdrawn, presumably because it lacked merit.

This request further constituted harassment as Busch had clearly not plead poverty in these negotiations in any manner. In fact, Busch had announced its intention to improve wages and benefits and had begun discussions to that end.

On March 22, 1995, Respondent made a detailed request for information concerning customer complaints about spare employees. Respondent falsely contended Busch had stated such complaints formed the basis for its proposal to cease its exclusive reliance on the hiring hall. Busch had never made that statement, but had stated that they receive more complaints about spares than regular employees. Busch was concerned about the request in part because the basis for it was false. Moreover, the volume and detail of the information sought in the request was burdensome, far in excess of what appeared necessary to investigate the issue. No relevance to negotiations was seen, for instance, in producing the entire personnel file of any employee about whom a complaint had been received. Busch offered to make available these records for Respondent's inspection. Respondent never acted on this offer, indicating a lack of real interest in the information. While much of the requested information was not available, it took a good amount of time for Busch to search the records to verify this fact. As with previous requests, Respondent appeared to make no use of this information.

On March 22, 1995, Respondent requested information concerning the identity and hours worked by spares. This request had obvious relevance to issues at the table on which both parties had made proposals. Busch did comply with the request, taking over 4 days of time to compile the information. Busch felt the request was harassing simply because it had requested similar data from Respondent in its information request, which Respondent has refused to produce, as discussed above.

At the plant meeting of April 4, 1995, an issue arose concerning whether one or two employees were required to set up draught trailer trucks when used by Busch. The parties disagreed on the contractual requirement. Respondent followed the discussion with a detailed information request requiring inspection of a voluminous number of files. As with prior requests, Respondent made no proposals based on the information it received and did not appear to use it in any way.

Respondent's information request of May 9, 1995, related to proposals concerning internal promotions. This issue had arisen during the 1991 negotiations. Busch had pledged to improve its record of internal promotions in 1991 and felt it had lived up to that pledge. During the May 3, 1995 plant bargaining session, Respondent had indicated that it felt there was a continuing problem relating to internal promotions. Busch expressed its view to Respondent that it had lived up to its pledge to increase internal promotions. When Schmitz asked Domesick to identify the problem, Domesick responded:

> If you want me to make a demand for information, I'm perfectly capable of doing it. We don't need another one.

Schmitz asked who had sought promotions and not received them. Domesick responded:

> What I understand is you have a comic corporate view. I don't have to look case by case to identify the issue. Maybe we ought to get the data. The corporate view is that you look at jobs in the bargaining unit as stepping stones.

Busch took this to be a threat of another information request if it did not subscribe to Respondent's view on the lack of internal promotions. Busch did not agree with Respondent and, several days later, the information request was made.

Compliance with this request was burdensome, taking about a week of Knipper's time, as well as 8–9 hours of the personnel administrator's time. Busch additionally felt the request was burdensome as Respondent already had access to the information through its steward, who was well acquainted with who in the unit had been promoted in the preceding years. Internal promotions were not a major issue in negotiations. Ultimately,

[78] It should be recalled that Respondent refused to produce or discuss *any* economic proposals until April *1996.*

[79] While Wahlgren's truncated comment is not reflected in Busch's notes, it is admitted he stated the word's "can't afford," but without completing his thought or providing a context for it.

agreement was reached on some minor language changes to article 3, section 2.

Following this request, which shortly preceded the filing of Busch's unfair labor practice charge, Respondent ceased making these burdensome information requests. Virtually no proposals by Respondent resulted from any of these information requests. Busch found the purpose of these requests to be to harass management, waste time and divert attention from actual negotiations, just as was outlined in *The Labor Page*.

Respondent proffered no testimony or evidence to rebut the General Counsel's allegations concerning its abusive use of information requests as part of its detailed bargaining strategy. Thus, it produced no testimony to explain either its motivation in making the requests or its use of the information received.

7. Conclusions with respect to the alleged 8(b)(3) violations

a. Summary of the fact findings

As the facts above demonstrate, Respondent sought from the outset to delay and frustrate their negotiations with Busch had had no intent to reach agreement. This strategy was consistent with the "detailed bargaining" strategy outlined in *The Labor Page* in 1994 by John Murphy concerning the Burke Distributing negotiations. Detailed bargaining allows Respondent to avoid the unpalatable alternatives of impasse or strike and further buys time for Respondent's consumer boycott to affect the employer. One hoped for result of this detailed bargaining strategy, as had previously occurred with Burke Distributing, was to force Busch to sell its distributorship to an entity more amenable to Respondent, accompanied by the possibility of a substantial cash payment to Respondent. That this was Respondent's goal was confirmed by its consistent statements to Busch to sell the distributorship during the first 2 months of negotiations. Thereafter, John Murphy exhorted Frank Curtis to sell the distributorship during a boycott demonstration at the Union Street Restaurant.

Respondent's detailed bargaining strategy was to create the image of bargaining but without any substance. It accomplished this, first, by keeping the frequency and duration of meetings to a minimum. Respondent insisted, contrary to past practice, on alternating meetings between the two bargaining units. Though a facially neutral decision, where the major issues existed in the drivers' unit, this had the effect of delaying agreement in either unit, pitting one against the other. Respondent resisted all attempts by Busch to have lengthier and more frequent meetings. Respondent refused all requests to set aside blocks of time for negotiations. It refused all requests to extend meetings later in the day or to meet on nights or weekends. Further, in scheduling meetings, Respondent rarely would agree to back-to-back meetings. This not only delayed negotiations and impeded momentum, but was highly inconvenient for Busch's negotiating team, which traveled from St. Louis.

When Respondent did come to the table, it frustrated negotiations by various conduct. Respondent used its chief negotiator, Attorney Stephen Domesick, to filibuster during the first nine months of negotiations with extensive and irrelevant lecturing and storytelling. In addition to consuming negotiating time, these filibusters distracted negotiations and disrupted momentum, particularly the Domesick's stories which were replete with sexual reference and innuendo. Respondent insisted on using valuable meeting time to negotiate in excruciating detail over minor issues, such as the FMLA, bereavement leave, the termination of dues checkoff and an interim agreement. Respondent delayed discussions of Busch's major issues. When it finally did discuss them, it "blew up" any substantive negotiations with regressive proposals, as it did in negotiating the hiring issue. Similarly, Respondent negotiated other issues only to blow them up with deliberate misunderstandings on Busch's positions, as it did with the interim agreement and the attendance policy. The effect of these tactics was to waste negotiating time and prelude any possible agreement, all a part of detailed bargaining.

Respondent further unlawfully delayed the presentation of its economic demands for months after Busch insisted upon seeing them. Respondent took the unusual step of not including economics in its initial demands. Fourteen months later, Busch began insisting on seeing them. Without explanation, Respondent refused to produce its economic proposals for another 5 months in the drivers' unit and 8 months in the plant unit. No agreement could be finalized without discussion and agreement on economics matters.

As part of its detailed bargaining strategy, Respondent refused to provide Busch with information relevant and necessary to the negotiations concerning its operation of the exclusive hiring hall and its health and welfare fund. Respondent also made abusive information requests of its own to Busch, making virtually no use of any of the information it received which had been burdensome and time consuming for Busch to compile. Ironically, some of the information requested by Respondent of Busch paralleled information it had refused to supply Busch.

Respondent's tactics at the bargaining table demonstrated it never had any intent to reach agreement. John Murphy's threat to Frank Curtis in 1995 that he would never sign a contract only confirmed Respondent's intent. Rather, Respondent engaged in a bargaining masquerade, implementing a sophisticated strategy more commonly utilized by employers, which was designed to delay and frustrate negotiations and to avoid agreement, allowing its other goals to be attained. While a party may lawfully include a consumer boycott as part of its negotiating strategy, it may not do so as a substitute for attempting to reach agreement at the bargaining table.

b. Respondent unlawfully refused to meet with Busch at reasonable times in violation of Section 8(b)(3) of the Act

For a party to fulfill its statutory bargaining obligation under Section 8(b)(3) of the Act, Section 8(d) requires that parties meet at reasonable times and confer in good faith concerning wages, hours and other terms and conditions of employment. Since the requirements of Section 8(b)(3) parallel those of Section 8(a)(5), the obligations imposed on employers in cases arising under Section 8(a)(5) are equally applicable to labor organizations in cases arising under Section 8(b)(3)*, Teamsters Local #612 (AAA Motor Lines),* 215 NLRB 789, 791 (1974).

Parties to collective bargaining are required to diligently pursue their negotiations with frequent and promptly scheduled meetings. Whether they have lawfully fulfilled that obligation

will be determined by the facts of each case. *Little Rock Downtowner,* 145 NLRB 1286, 1305 (1964), enfd. 341 F.2d 1020 (8th Cir. 1965). In *J. H. Rutter-Rex, Inc.,* 86 NLRB 470, 506 (1949), the Board stated:

> The obligation to bargain collectively surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting or conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for the elimination of obstacles thereto comparable to that which he would display in his other business affairs of importance.

The use of delaying tactics in negotiations is indicative of a party's overall lack of good faith. *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984).

A party's good-faith obligation to negotiate includes a statutory duty to make its authorized representative available for negotiations at reasonable times and places. *Crane Co.,* 244 NLRB 103, 111 (1979). A party acts at its peril when it chooses as a bargaining agent someone who is encumbered by other conflicts which limit his availability. *Nursing Center at Vineland,* 318 NLRB 901, 905 (1995); *Caribe Staple Co.,* 313 NLRB 877, 893 (1994); *O & F Machine Products Co.,* 239 NLRB 1013, 1019 (1978); *Imperial Tile Co.,* 227 NLRB 1751, 1754 (1977); and *Exchange Parts Co.,* 139 NLRB 710, 714 (1962), enfd. 339 F.2d 829, 832 (5th Cir. 1965). Considerations of personal convenience, including those of professional conflicts, do not take precedence over the statutory obligation under Section 8(d) that bargaining take place with expedition and regularity. *Caribe Staple,* supra. If a given negotiator becomes indisposed or is otherwise unable to discharge his statutory responsibility to negotiate, it is the duty of the party involved to designate a negotiator who can fully discharge his obligation. "*M*" *System, Inc.,* 129 NLRB 527, 549 (1960). Similarly, the obligation to meet at reasonable times is not diluted by the demands of a respondent's business. *Barclay Caterers,* 308 NLRB 1025, 1035 (1992). This principle is particularly appropriate when, as it is here, a major component of the business of Respondent *is* the negotiation of collective-bargaining agreements for those members which it represents.

Under these principles, it is evident that Respondent engaged in dilatory tactics by its insistence, over Busch's repeated objections, that negotiating sessions be infrequent and for minimum duration. Respondent's tactics were manifest from the outset in September 1994 when it delayed in responding to Busch's offered dates and then accepted only single dates per unit at the *end* of the offered period. The refusal to schedule more than only one meeting at a time is evidence of bad faith. *Barclay Caterers,* supra at 1037. Similarly, the refusal to agree to back-to-back meetings, particularly where the other party's negotiator has to fly in from another city, is evidence of bad faith. *Eastern Maine Medical Center,* 253 NLRB 224, 246 (1980), enfd. 658 F.2d 1 (1st Cir. 1981).

It is no coincidence that Respondent *never* initiated any discussion of future meeting dates. Nor is it coincidence that an experienced labor lawyer frequently failed to bring his calendar to meetings and generally delayed in responding to offered meeting dates, sometimes for weeks. Similarly, Respondent's game playing in scheduling meetings was also not coincidental. This included Respondent's failure to offer additional dates upon the postponement of the Burke trial and its offering of dates it knew were difficult for Busch to accept. Conceivably, Respondent's faxing of its June 23, 1996 letter to the wrong fax number was also not coincidental.

Respondent's reluctance to meet with Busch was prophesied in Murphy's *Labor Page* article as a component of detailed bargaining. It is a striking parallel that the number of meetings in the first 2 years of the Burke and Busch negotiations were almost identical. Respondent met 40 times in 2 years with Burke; it met only 30 times in the drivers' unit and 17 times in the plant unit in the first 2 years with Busch. Limited meetings are an integral part of the detailed bargaining strategy designed to avoid impasse or strike. More frequent meetings increase the undesirable likelihood of either alternative, which Respondent was desperate to avoid. The Board has found violations of Section 8(a)(5) on meetings of similar infrequency. See, e.g., *Vision, Inc.,* 249 NLRB 412 (1980), enfd. 660 F.2d 1 (1st Cir. 1981) (22 meetings over 14 months); *Caribe Staple Co.,* 313 NLRB 877 (1994) (10 meetings in 13 months); *Radisson Plaza Minneapolis,* 307 NLRB 94 (1992) (11 meetings in 9 months); *Rhodes St. Clair Buick,* 242 NLRB 1320 (1979) (6 meetings in 6 months). Accordingly, an 8(b)(3) violation is found on that basis alone.

When the parties did meet to negotiate, Busch spent a substantial amount of negotiating time attempting to get Respondent to comply with its statutory duty to meet more often and to provide the information requested in its two information requests, which directly related to the negotiation. Requiring Busch to spend negotiating time on such issues makes even more evident Respondent's violation in refusing to meet with Busch. *Barclay Caterers,* supra at 1037. That the parties did manage to discuss substantive issues on occasion during their negotiations shows, not that the meetings were reasonable in frequency and duration, but, rather, that an agreement might well have been reached had Respondent been agreeable to longer and more frequent meetings and demonstrated an intent to reach agreement. *Rhodes St. Clair Buick,* supra at 1323.

The Busch negotiations occurred with the consistency of a metronome, but at a pace designed to forestall agreement. While Respondent never outright refused to meet and negotiate, it made certain that negotiating sessions were infrequent and brief. Thus, in the first 2 years in the drivers' unit, there was at least a week between almost every session and, on 13 occasions, over a month between sessions, with a maximum of 2 months. In the same period in the plant unit, there was at least a week between sessions, with three delays of 3–5 *months* between sessions. Negotiating sessions in the first 2 years in the drivers' unit averaged only 3-1/2 hours per session; in the plant unit, they averaged only 3.1 hours. With regularity, Respondent terminated meetings at or before 4 p.m., regardless of the status of the discussion at the time. Placing restrictions on the length of meetings impedes negotiations and violates Section 8(b)(3) particularly where, as here, the other party's representative had

to fly in from another city in order to attend negotiating sessions. *John Ascuaga's Nugget,* 298 NLRB 524, 528 (1990).

Though provided a room in advance of meetings by Busch, Respondent was late for *every meeting* but the first driver's session, generally by at least 30 minutes. Respondent also canceled seven negotiating sessions, never offering to reschedule or make them up. Respondent's behavior concerning the length and frequency of negotiations is characteristic of a party which is going through the motions of bargaining, but without any actual intent to reach agreement. Busch's persistent objections to this conduct did not deviate Respondent from its path. A party is not required under the Act to beg for meeting dates. See *Barclay Caterers,* supra at 1035 (1992).

While Respondent could lawfully insist on negotiating each unit's contract separately, its insistence on alternating meetings between the two units served only to delay agreement in both. This insistence was obviously part of the strategy. Even members of Respondent's own plant negotiating committee conceded that the serious issues were in the drivers' unit and that the plant contract would be settled as soon as the drivers' contract settled. Knowing this, Respondent could further delay either agreement by insisting on alternating meetings.

Respondent's strategy had a particularly negative effect on the plant unit. There can be no lawful explanation for the infrequency of meetings in this unit, particularly where there was a lack of compelling issues. Rather, Respondent held this unit hostage to the drivers' unit negotiations. The obvious explanation is that, politically, Respondent could not afford the possibility of contract in the plant unit while the drivers' negotiations continued with the possibility of a strike or impasse.

Busch's repeated insistence on more frequent and lengthier meetings, and the variety of means by which it unsuccessfully sought to obtain them, make clear that Respondent controlled the scheduling of negotiations. During the first year of negotiations, Chief Negotiator Schmitz had Busch almost totally available to negotiate, offering extensive and consecutive dates for negotiations including nights and weekends. Chief Negotiator Telegen consistently offered blocks of a week or more for negotiations, usually offering dates months in advance to minimize schedule disruptions. Generally, Respondent simply refused, without explanation, to engage in more frequent or lengthier negotiations. It simply cherry picked isolated, nonconsecutive dates for negotiations from the vast array of dates offered by Busch. Claims such as the press of Domesick's business as a sole practitioner, his frequent claims of failing health or the demands on Murphy's time as a union official, are simply not legally sufficient to forestall negotiations. *Nursing Center at Vineland,*, supra, and cases cited therein. "Collective bargaining negotiations are entitled to the importance and attention of any other business affairs." *Eastern Maine Medical Center,* supra at 247.

Moreover, the legitimacy of any claim of unavailability by Murphy is belied by the facts. First, Murphy's *Labor Page* strategy dictated his deliberate limited availability. Second, as a union official, it is Murphy's *business* to be available to negotiate contracts. Third, and most importantly, Murphy's limited availability did not preclude him from attending *over 200* boycott events conducted by Respondent against Busch during the period of negotiations. While many of these events were scheduled for afternoons, nights, and weekends, Busch had frequently offered to negotiate at those times as well. Thus, it is obvious that Murphy *chose* to be unavailable to negotiate, just as he chose to be available for boycott activity. That choice demonstrates where his priorities lay and is entirely consistent with his *Labor Page* strategy. Similarly, Respondent's refusal, without explanation, to respond positively to Busch's offer to adjust the negotiation schedule to accommodate Domesick's illness in the late summer of 1995 warrants a finding of a violation of Section 8(b)(3). *John Ascuaga's Nugget*, supra at 528. By refusing to agree to the more frequent and lengthier negotiations requested by Busch, Respondent violated Section 8(b)(3). *Crispus Attucks Children's Center,* 299 NLRB 815 fn. 3 (1990); *Radisson Plaza Minneapolis,* 307 NLRB 94, 96 (1992).

The facts on this issue are a striking parallel to those in *Cable Vision, Inc.,* 249 NLRB 412 (1980), enfd. 660 F.2d 1 (1st Cir. 1981). In *Cable Vision,* the parties met only 22 times over 14 months, averaging only 4.5 hours per session. The Union repeatedly requested for lengthier and more frequent meetings, including offering to meet 7 days a week, 24 hours per day. The Respondent ignored these requests. Only four of these meetings started on time. As the administrative law judge noted in finding a violation, this pattern "can hardly be characterized as diligent bargaining." *Cable Vision,* supra at 420. A similar reluctance to engage in diligent negotiations by Respondent existed here.

Respondent's own words served to explain its pattern of delay. In addition to seeking time to enable its boycott to work, Respondent also did not want to negotiate because it viewed Busch's proposals as unpalatable. Attorney Domesick repeatedly tied additional meetings to the withdrawal or modification of those proposals. Domesick further tied agreement to more frequent meetings to his own assessment that progress was being made in negotiations, which also equated to Busch's withdrawal of proposals. On November 10, 1994, just before contract expiration, Domesick refused to schedule further meetings, including on nights and weekends, because he did not view progress being made and Busch had not removed proposals from the table. At the March 21, 1995 meeting, Domesick conditioned further meetings both on Busch's removal of its proposals as well as Busch's agreement to continues dues checkoff. Such statements are evidence of Respondent's unlawful desire to delay negotiations. *Eastern Maine Medical Center,* supra at 246.

Respondent at no time in these proceedings produced any evidence or argument concerning its clear resistance to meeting with Busch. Respondent presented no evidence concerning its motivation in refusing to engage in more frequent or lengthier bargaining sessions with Busch. While John Murphy did testify, he offered no testimony on this allegation. Attorney Domesick represented Respondent at trial, but also did not testify about this issue. Any statements made as counsel by Domesick do not constitute evidence in this matter. Moreover, while Domesick extensively cross-examined Pat Knipper for several days, he asked Knipper not a single question on this subject. Thus, the facts presented by the General Counsel on this allegation remain wholly unrebutted. An adverse inference will be drawn

from Respondent's failure to rebut the facts presented by General Counsel. *Grimmway Farms,* 314 NLRB 73 fn. 2 (1994).

c. Respondent violated Section 8(b)(3) of the Act by engaging in surface bargaining through the use of detailed bargaining tactics

To determine whether a party has engaged in surface or bad-faith bargaining, the Board examines the totality of that party's conduct, both away from and at the bargaining table, for evidence of its real desire to reach agreement. *Bethea Baptist Home*, 310 NLRB 156 (1993); *Overnite Transportation Co.,* 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). Threats and other statements made away from the bargaining table may establish the bad faith of a party's negotiations. *Overnite Transportation Co.,* supra.

The principles under which surface bargaining will be determined have been long established, and involve the subjective attitude of the Respondent. As the First Circuit stated in *NLRB v. Reed & Prince Mfg. Co,* 205 F.2d 131, 139–140 (1st Cir. 1953):

> The ultimate issue whether the [Respondent] conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence. It is similar to the inquiry whether an employer discharged an employee for union activity . . . .

Parties must make "a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents,* 361 U.S. 477, 487 (1960). They must not enter negotiations with a "predetermined resolve not to budge from an initial position." *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 154–155 (1956) (Frankfurter, J. concurring). "Both the employer and the union have a duty to negotiate with a 'sincere purpose to find the basis of an agreement.'" *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984) (citation omitted).

The principles which control the refusal-to-bargain allegations in this case, as applicable to a union as to an employer, were succinctly summarized in *NLRB v. Herman Sausage Co.,* 275 F.2d 229, 231–232 (5th Cir. 1960), as follows:

> The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained. It does not permit the Board, under the guise of finding bad faith, to require the employer to contract in a way the Board might deem proper. Nor may the Board "directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of the collective-bargaining agreements" for the Act does not "regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." [Citations omitted.]
>
> On the other hand, while an employer is assured these valuable rights, he may not use them as a cloak. In approaching it from this vantage, one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining," or "shadow boxing to a draw," or "giving the Union the runaround while purporting to be meeting with the Union for purposes of collective bargaining."

Finally, good faith "requires more than a willingness to enter upon a sterile discussion of union-management differences," yet does not demand that a party "engage in fruitless marathon discussions at the expense of frank statement and support of his position." *NLRB v. American National Insurance Co.,* 343 U.S. 395, 402, 404 (1952).

While Section 10(b) precludes the finding of a violation of unlawful conduct occurring more than 6 months from the filing of a charge, "earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." *Machinists Local 1424 v. NLRB,* 362 U.S. 411, 416 (1960).

Applying these principles herein, it is evident that Respondent never had any intention of reaching agreement with Busch in the 1994 negotiations. Rather, Respondent strictly followed the "detailed bargaining" strategy described in *The Labor Page*, attempting to duplicate its perceived success in the prior negotiations with Burke Distributing.

To determine Respondent's surface bargaining, its conduct must be viewed in totality. Two key components of the overall strategy have been previously described. Respondent kept the frequency and duration of negotiating sessions to a minimum. In so doing, it created the appearance of negotiating while eliminating any possible momentum needed to reach agreement. Respondent further refused to provide Busch with requested information on two critical areas in the negotiations-the hiring hall and the health and welfare fund. This refusal, in addition to demonstrating Respondent's overall bad faith in the negotiations, precluded the possibility of agreement on these two issues, without which no contract could be reached. *Radisson Plaza Minneapolis,* 307 NLRB 94 (1992); *Cable Vision, Inc.,* 249 NLRB 412 (1980)

While these two unfair labor practices alone may have been sufficient to preclude an agreement, Respondent used its "detailed bargaining" strategy at the negotiating table as well. It engaged in surface bargaining through a variety of tactics to ensure that no agreement would be reached.

Because Respondent chose to put on no case in response to the General Counsel, the underlying motivation for its detailed bargaining strategy remains a mystery. Perhaps it feared that, were it to negotiate with Busch on a level playing field, it would have to agree to some of Busch's proposals which it may have found undesirable. Compromises on those proposals, however, were quite evident. Busch, further, showed a willingness to compromise, as in its willingness to entertain Respondent's spares roster concept as a compromise for eliminating the exclusive reliance on the hiring hall.

It is even more likely that Respondent expected that its detailed bargaining strategy, coupled with its extensive consumer boycott, would bring Busch to its knees as it did Burke Distributing several years before. Respondent admittedly hoped it would gain a sale of Busch's business to a more amenable em-

ployer. Beginning with the first negotiating session on October 13, 1994, Domesick repeatedly stated Respondent's preference for a new owner to whom the distributorship would be the "crown jewel" and to which Respondent would be more willing to make concessions. This sale could also bring a potential financial windfall to Respondent as it did with Burke. As Knipper stated, referring to Burke's payment of "termination proceeds" to Respondent, he could envision at least 590,000 reasons why Respondent would want to delay negotiations and bargain in bad faith.

Regardless of its motivation, Respondent's bad faith is evident from its conduct both at and away from the bargaining table. Murphy's article in *The Labor Page* serves as a blueprint for its conduct here and is compelling evidence of its bad faith. *Overnite Transportation Co.,* supra at 671: The parallels to the Burke negotiations as described in the article are striking. The number of meetings in the time period are virtually identical. Respondent continued to make "good use" of its lawyer "by dissecting and arguing over every sentence that [Busch] put of the table." Respondent further continued its practice of making detailed information requests to frustrate and delay the negotiations. As with Burke, this strategy was designed to buy time to allow Respondent's consumer boycott to pressure Busch and to avoid impasse or strike. As Murphy stated, the strategy caused Burke to sell its franchise to an employer who "could do business with the union." Clearly, Respondent expected to obtain the same result with Busch. While a party is lawfully entitled to use boycott activity as part of a bargaining strategy, it may not do so as a substitute for reaching a collective-bargaining agreement. Of course, a union may not, as Respondent did here, use unlawful secondary pressure as part of its consumer boycott. These 8(b)(4) violations further evidence Respondent's bad faith.

That a sale was Respondent's goal was further evidence by Murphy's unsolicited exhortation to Frank Curtis in the Union Street Restaurant in February 1995 to sell the business. This unrebutted statement was made in the context of Murphy's anger and frustration with difficulties at one of his boycott events. Since the consumer boycott was a vital component of Respondent's bargaining strategy, this comment conclusively demonstrates Respondent's goal. Id.

This goal was further clarified by Murphy's statement to Curtis in September 1995 that Busch would never get a contract from him. This unsolicited statement by Murphy, made during a discussion of the negotiations, went unrebutted in his testimony. Murphy's threat eliminated any lingering doubt that Respondent would bargain in good faith with Busch. Unmitigated by any assurances that Respondent would bargain in good faith, Murphy's threat establishes Respondent's bad faith in negotiations. *Overnite Transportation Co.,* supra at 671

Respondent further demonstrated an uncompromising attitude throughout the negotiations. This attitude was typified by Attorney Domesick's threat to blow up the plant if Busch attempted to sell the facility without a collective-bargaining agreement in place. This shocking threat, made by an experienced labor attorney and unrebutted at trial, emphasized Respondent's seriousness of purpose and its uncompromising attitude towards negotiations. While, fortunately, Respondent did not act on Domesick's threat of physical violence, as will be shown it did successfully "blow up" the negotiations at the bargaining table.

On those occasions when it did meet with Busch, Respondent approached negotiations with an object of spending time, but accomplishing nothing. No clearer evidence of that exists than the limited number of agreements reached in over 2 years of meetings. While it may be argued that the fact there were any agreements mitigates against a conclusion of surface bargaining, *none* of the agreements reached were on major issues. Moreover, in over 2 years of negotiations, it is not inconceivable that, on occasion, some real negotiations would break out from the detailed bargaining monotony. Admittedly, this did happen and minor agreements occasionally resulted. This fact does not diminish the conclusion that Respondent sought to avoid a collective-bargaining agreement and violated Section 8(b)(3) to attain that goal. See *Radisson Plaza Minneapolis,* 307 NLRB 94, 115 fn. 56 (1992).

The tactics Respondent utilized to achieve its ends varied as negotiations wore on. Initially, Respondent stalled negotiations by making "good use" of Attorney Domesick to filibuster negotiations with his constant philosophizing and storytelling. The relevance of these narratives was tangential at best. Respondent, further, made no attempt to prove any relevance to them in its defense. In combination, Domesick's philosophizing and storytelling consumed a great deal of time during the first 9 months of negotiations. In addition, they distracted the negotiators from the discussions at hand, disrupting any real or potential momentum. The topics of these narratives frequently concerned power and its abuses and Domesick's perceptions of management, Busch's in particular. Domesick's storytelling was replete with sexual references and innuendo which, in and of themselves, were offensive, distracting and irrelevent. He further offered numerous snippets allegedly of his personal life experiences, which also generally had a sexual reference. That this was a deliberate tactic is evidenced by the unrebutted testimony of Knipper that Domesick did not engage in similar behavior in the 1991 negotiations. Engaging in "extensive perambulations" on unrelated topics during negotiations constitutes a pattern of dilatory conduct which is in violation of Section 8(b)(3). *Radisson Plaza Minneapolis*, supra at 96. The real reason for Domesick's storytelling, as stated by the administrative law judge in that case, was "a sham, designed to dazzle, then to distract and delay the collective bargaining process." Id. at 101.

Respondent further stalled negotiations by the topics it chose to discuss. Respondent consistently delayed discussion of major issues, insisting on focusing on less important matters. Spending the only three plant unit meetings in over 3 months, totaling 14 hours, in dissecting every detail of the Busch's FMLA proposal was a sophisticated filibuster under the guise of negotiations. This behavior was the essence of "detailed bargaining," appearing real, but lacking substance. Had those meetings been real negotiations, Respondent would have made a counterproposal on FMLA before the third meeting, rather than insisting on analyzing only Busch's proposal. Had these been real negotiations, Respondent would not have excluded the length of FMLA leave from the counterproposal it ultimately made. In

fact, Respondent never proposed a length of FMLA leave, without which no agreement could be reached, which Respondent well knew.

Respondent's extensive discussion of the bereavement leave issue, to the evident amusement of its own committee, served a similar purpose. While Busch was not philosophically opposed to the concept of leave for domestic partners, there was no evidence that the matter was desired or supported by the unit, particularly as a major issue. Yet, Respondent chose to extend the bereavement leave discussion by creating a political issue, insisting gay employees "out" themselves in order to receive the benefit. This discussion served primarily to consume time and distract from other more important issues. The agreement ultimately reached was quite similar to Busch's initial counterproposal, containing no "outing" provision.

Throughout the negotiations, Respondent showed a penchant for refusing to accept or reject proposals, preferring to consider them and have additional discussion. As also shown, Respondent refused to make counterproposals on many occasions. In one such case, Domesick claimed to have 40 counterproposals, but refused to divulge any of them. On occasion, Respondent refused to explain its proposals or its understanding of existing contract language. These are not the actions of a party uninformed, but rather serve as a deliberate tactic "to string out bargaining to the limit in an attempt to delay or avoid agreement." *Cable Vision, Inc.,* 249 NLRB 412, 421 (1980).

Similar time wasting occurred in the prolonged discussion, at Respondent's insistence, of the termination of dues checkoff and of the interim agreement. Respondent's anger over the termination of checkoff, a direct result of its harassment lawsuit against Busch, should have been more properly directed at itself for creating the problem. Yet, Respondent typically seized the opportunity to devote almost two meetings to futilely haranguing Busch to reinstate checkoff.

Similarly, the interim agreement discussion was a classic red herring. Seeking an opportunity to make a bridge to an agreement, Busch agreed to discuss separate interim agreements in each unit whereby Respondent would get items it wanted, particularly dues checkoff, in return for agreement on issues Busch sought. In the drivers' unit, Busch explicitly sought agreement on its major issues. After months of discussion, Domesick claimed an interim agreement was reached in the driver's unit consisting wholly of items desired by Respondent and proposed in plant unit discussions. Those negotiations had been conducted separately from the drivers' unit at Respondent's request. A true misunderstanding by Respondent on this point is inconceivable. Having wasted considerable time in futile pursuit of an interim agreement, Respondent, over several meetings, continued to waste more in arguing about whether one had been reached. Yet, when Busch thereafter attempted to reach an interim agreement in the plant unit, where the issues involved were all enhancements to the unit, Respondent refused to agree. Evidently, the idea of one of its units having an interim agreement while the other did not was too unpalatable. While no interim agreements were reached, considerable time was spent futilely chasing the concept. Respondent's interests were thus served.

The extensive discussion of Busch's attendance proposal, at the conclusion of which Respondent claimed not to have considered whether bookoffs would be a valid excuse for absence under the policy, similarly demonstrated a sophisticated ability to waste time under the guise of negotiating. Even the most naïve could not believe that Respondent could believe bookoffs could still exist after Busch had clearly made their elimination a cornerstone of its proposal. Of course, only when Respondent revealed its duplicity could Busch realize that those negotiations had been illusory.

Admittedly, Respondent did occasionally engage in substantive negotiations, only to bring them to a screeching halt. After a period of substantive discussion, during which Busch may have been lulled into the false belief that real negotiations were occurring, Respondent would "blow up" the negotiations by taking a wholly untenable position. The interim agreement negotiations typified Respondent's behavior in those situations. Respondent similarly "blew up" the negotiations concerning hiring just as an agreeable compromise neared.

The right to directly hire spares was one of Busch's key positions. Evidently, it was one of the most unpalatable to Respondent, requiring it to relinquish its exclusive hiring hall. Respondent steadfastly refused to negotiate on the issue for over a year. Rather, negotiating time was spent on less compelling issues. Once Busch got Respondent to discuss the issue beginning in November 1995, *Respondent* proposed a spares roster compromise which Busch found attractive. This proposal was the essence of compromise and demonstrated Busch's willingness to consider and adopt alternatives to its own proposals. Under the spares roster proposal, Busch and Respondent would each nominate an equal number of candidates to the spares roster from which Busch would be able to hire spares directly. This proposal allowed each party to retain some, but not all, of what it desired.

Having spent two meetings progressing towards compromise on one of the major issues of the negotiations, Respondent presented Busch with a regressive proposal which totally ignored the spares roster concept. Instead, it simply reworded the language of the exclusive hiring hall provision of the contract. Resubmitting proposals with insubstantial or no change is evidence of bad faith bargaining. *Cable Vision, Inc.,* 249 NLRB 412, 420 (1980), enfd. 660 F.2d 1 (1st Cir. 1981). Respondent refused to discuss the issue further, including its own counterproposal, falsely claiming too much time had been spent on the issue. Respondent ignored the far greater time it had spent on the less serious issue of FMLA in the plant unit negotiations.

Respondent engaged in similar conduct concerning Busch's attendance proposal. Another key item on Busch's agenda, the attendance proposal, sought the elimination of bookoffs. This fact was made undeniably clear to Respondent over numerous meetings, proposals and counterproposals over a year and a half. Ultimately, Respondent "blew up" the negotiations on this issue by claiming not to have contemplated the elimination of bookoffs in its proposal. With continued bookoffs, the attendance proposal was rendered meaningless, as were the extensive negotiations concerning it. Thus, once again, Respondent had created the illusion over a considerable period of time of negotiating an issue only to reveal its lack of substance and

good faith. Respondent's true purpose was to delay and avoid agreement.

In each of these areas, Respondent consumed considerable time in apparent negotiations, only to ultimately reject any compromise and return to the status quo. It demonstrated a wholesale unwillingness to budge from any of its positions on major issues. Particularly on the hiring and attendance issues, Respondent reverted to its initial position after extensive discussions of alternatives. Thus, what may have superficially appeared to be negotiations were revealed to be detailed bargaining at its essence—time spent in discussion, but with no intent to reach agreement.

Respondent further prevented agreement by refusing to present its economic proposals. Failing to present any economic demands in its initial proposals was unusual. Failing to offer any economics during the succeeding 14 months of negotiations was unconscionable. Refusing Busch's persistent requests for Respondent's economic proposals in the drivers' unit for an additional *7* months was unlawful.[80] *Southside Electric Cooperative, Inc.,* 243 NLRB 390 (1979); *Eastern Maine Medical Center,* 253 NLRB 224, 244–245 (1980), enfd. 658 F.2d 1 (1st Cir. 1981); *South Shore Hospital,* 245 NLRB 848 (1979), enfd. 630 F.2d 40 (1st Cir. 1980). Even when first presented in April 1996, Respondent's economic proposal did not contain a wage demand. Respondent never advanced a reason or justification, either during negotiations or at trial, for its refusal to present its economic proposals. While the parties may have initially agreed to discuss noneconomic items first, there was certainly no agreement they be done to conclusion before economic discussion commenced. Yet, even after Busch made perfectly clear that any such purported agreement was no longer acceptable by repeatedly insisting on discussing economics, Respondent unlawfully persisted in its refusal to discuss economics. *Preterm, Inc.,* 240 NLRB 654 (1979); *Eastern Maine Medical Center,* supra at 245.

The effect on negotiations of this refusal was obvious. No collective-bargaining agreement can be consummated without discussion and agreement on economic terms. Resolution of other issues may hinge on discussion of economics.[81] "[B]argaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." *Korn Industries v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967). Busch justifiably could not consider Respondent's proposals, including its early retirement proposal without an eye towards its entire economic package. "Such fragmentation of negotiations limited the flexibility of the bargaining process, as it precluded trading economic proposals for non-economic proposals which is a customary avenue of compromise." *Preterm, Inc.,* supra at 672. Thus, Respondent's refusal to present and discuss its economic demands was yet another device by which it delayed negotiations and any possible agreement.

The eight information requests issued by Respondent to Busch were an additional part of the detailed bargaining strategy. The use of information requests is an admitted part of the detailed bargaining strategy in *The Labor Page*. Like other components of detailed bargaining, certain of the information requests had a superficial validity. Yet their true purpose was to harass Busch, diverting time and attention away from negotiations at the table. Busch had to spend considerable time researching and responding to each request, even when finding no responsive information. While Busch could have resisted these requests where burdensome or irrelevant, it did not, complying fully with each. Respondent even persisted in renewing certain requests, requiring additional time and effort by Busch to respond. No such requests had been made by Respondent in 1991, when detailed bargaining was not being used. Critically, virtually no use was made in bargaining of any of the information provided to Respondent. This, in itself, establishes that the purpose of the requests was to harass Busch and delay negotiations, in conformance with the overall strategy. Moreover, Domesick's threat to make an information request in May 1995 if Busch did not accede to its position demonstrates the unlawful purpose of these requests.

Respondent engaged in surface bargaining throughout the 1994 negotiations. It entered the negotiations determined to implement its detailed bargaining strategy and, at no point, did it have an intent to reach a collective-bargaining agreement. All of the tactics Respondent employed point to that conclusion. It insisted, without reason, on separate negotiations in each unit for the first time. It inexplicably refused the offer of a contract extension. It resisted all attempts to bring in a federal mediator to assist in bridging the differences between the parties. While these actions alone are not unlawful, they are not those of a party sincerely desirous of reaching agreement.

But it is by its conduct at the table that Respondent's unlawful objective is truly revealed. For over 2 years, it resisted Busch's entreaties for lengthier and more frequent negotiations. It refused to provide relevant and necessary information relating to negotiations, thereby precluding meaningful bargaining on those issues. Further, Respondent engaged in a pattern of dilatory conduct in negotiations, including Domesick's storytelling and philosophizing, which deliberately impeded bargaining. These factors warrant a finding of surface bargaining. *Radisson Plaza Minneapolis,* supra. Similarly, Respondent's conduct in refusing to make or explain its proposals, refusing to make concessions on proposals, making regressive proposals and resubmitting essentially the same proposal warrants a finding that it engaged in surface bargaining. *Cable Vision, Inc.,* supra.

As shown by the lack of substantive agreements in over 2 years of negotiations despite Busch's demonstrated willingness to compromise, Respondent participated in the negotiations with no object but to delay. Respondent's consumer boycott had served it well with Burke; it was confident it would succeed again. The conclusion is inescapable. Busch's negotiations with Respondent constituted unlawful "shadow boxing to a draw." *NLRB v. Herman Sausage, Inc.,* supra.

[80] Respondent's economic proposals in the plant unit were not presented for an additional *3 months*.

[81] Contrary to Respondent's contention that it does not engage in horsetrading, such dealings are a traditional component of collective bargaining and, indeed, were engaged in by Respondent in the 1991 negotiations.

d. Respondent raised no substantive defense to the allegations that it violated Section 8(b)(3) of the Act

Respondent presented no substantive defense to these allegations. The General Counsel's case in chief on this portion of the case took 7 days. Respondent then cross-examined the General Counsel's witness, Pat Knipper, for *10* days, demonstrating a far greater willingness to speak to him at trial than it did at the negotiating table. This cross-examination consisted largely of Respondent's counsel having Knipper confirm the accuracy of Busch bargaining notes, which were already in evidence, for each day of negotiations. Busch's notes were demonstrated to be highly accurate, almost devoid of error. On the 9th-day of this exhaustive, time-consuming and, indeed, abusive cross-examination, I limited further cross-examination of Knipper in this manner. This ruling was made in order to avoid the needless consumption of time and further harassment of Knipper. See Section 102.35(f), Rules and Regulations of the National Labor Relations Board; Federal Rules of Evidence, Rules 403; 611(a).

Respondent's response was to put on no defense other than its own bargaining notes. These typed notes had been taken by Attorney Domesick and were attempted to be authenticated by John Murphy. Murphy offered no substantive testimony concerning Domesick's notes or the negotiations. Respondent also did not reveal the existence of, or offer, Murphy's own notes which had been subpoenaed and were produced only grudgingly upon my order at the end of trial. Thus, Respondent's sole defense to the 8(b)(3) allegations involves a reading of its attorney's notes of negotiations.

These notes are far less detailed and more conclusionary than those of Busch. They do not, in any substantial way, dispute Busch's notes or Knipper's testimony concerning the conduct of negotiations. If anything, they tend to confirm essential points in Busch's notes. Murphy's testimony demonstrated his own notes, which Respondent declined to offer, to be more detailed and complete than Domesick's. Moreover, Murphy was incredible in his testimony concerning his review of Domesick's notes, contending he had found not a single error, which was demonstrated to be false. Murphy could not explain how Domesick's notes were prepared or the meaning of certain passages. In short, Domesick's notes cannot be relied upon in any credibility disputes. As noted at the beginning of this discussion of the bargaining issues, I consider the Busch notes and Knipper's testimony to be the only credible evidence of what occured at the negotiations. Nothing offered by Respondent in this regard was remotely credible.

Respondent offered no denial that it had a detailed bargaining strategy or that it sought to delay and frustrate the negotiations. Respondent offered no testimony that it had intent to reach agreement with Busch or engaged in negotiations to that end. Respondent did not deny that its tactics at negotiations were designed to delay and frustrate the ability of the parties to agree. Further, Respondent offered no explanation for any of its conduct. No reading of Respondent's notes could provide such denials or explanations. In short, the evidence presented by General Counsel which establishes that Respondent engaged in surface bargaining is unrebutted and Respondent's defense of the complaint allegation in these regards is totally frivolous.

e. Should Respondent be ordered to pay the Charging Party's negotiation and litigation expenses and the General Counsel's litigation expenses?

In order to remedy the extensive and egregious violations found in this matter, the General Counsel seeks an order requiring Respondent to pay to the General Counsel and the Charging Party the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this proceeding, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses as determined at the compliance stage of this proceeding. Further, the General Counsel seeks an order requiring Respondent to pay to the Charging Party the costs incurred by it in the preparation and conduct of collective-bargaining negotiations subsequent to October 13, 1994.

The Board will order the reimbursement of litigation expenses where the defenses raised by the Respondent are "frivolous" rather than "debatable." *Frontier Hotel & Casino,* 318 NLRB 857 (1995), enf. denied in part 118 F.3d 795 (D.C. Cir. 1997);[82] *Heck's Inc.,* 215 NLRB 765 (1974); and *Tiidee Products,* 194 NLRB 1234 (1972). The Board's purpose in awarding litigation expenses where a respondent raises patently frivolous defenses is to discourage such needless litigation and to maintain speedy access to the Board's processes. *Frontier Hotel,* supra at 860. Where a respondent's defenses, even though meritless, turn on issues of credibility, they will be considered debatable rather than frivolous and litigation expenses will not be awarded. *Workroom for Designers, Inc.,* 274 NLRB 840 (1985); *Adam Wholesalers, Inc.,* 322 NLRB 313 (1996).

In *Frontier Hotel,* the Board held that an award of litigation expenses was appropriate even though the respondent's defenses were credibility based since the testimony of Respondent's attorney and chief negotiator was transparently untruthful and totally lacking in credibility. Id. at 861. The Board has also found no credibility issues existed and ordered the reimbursement of litigation expenses where the respondent admitted its perjury and unlawful motivation in the creation of an alter ego to evade its bargaining obligation. *H. P.Townsend Mfg. Co.,* 317 NLRB 1169 (1995). Similarly, in *Care Manor of Farmington, Inc.,* 318 NLRB 330 (1995), respondent was ordered by the Board to pay the charging party's and the Board's litigation expenses in a case alleging a refusal to bargain over an initial contract in violation of Section 8(a)(5). The Board found no credibility issues existed where respondent had presented no witnesses or raised any factual issues. Rather, respondent had unsuccessfully attempted to raise issues solely through its cross-examination of the General Counsel's wit-

[82] While the D.C. Circuit, in a split decision, found the Board lacked authority to award litigation expenses in these circumstances, the First Circuit, where these violations occurred, has not spoken to the issue. Moreover, the Board has clearly not yet had time to consider an appeal or, in its absence, any ramifications D.C. Circuit's decision might have on this issue. Thus, with due deference to the D.C. Circuit, until those matters are determined, it is appropriate that litigation expenses be awarded here, consistent with the Board's decision in *Frontier Hotel* and its progeny. The D.C. Circuit did enforce the Board's authority to award negotiation expenses as a remedy.

nesses. See also *Park Manor Nursing Home, Inc.,* 318 NLRB 1085 (1995) (litigation expenses awarded in surface bargaining case under Sec. 8(a)(5) of the Act).

As in those cases, the violations are not based on credibility resolutions. While the facts are extensive, covering over 2 years of collective bargaining and over 50 negotiating sessions, there is virtually no dispute concerning them. Respondent presented no witnesses or substantive testimony, relying *solely* on its own bargaining notes and its cross-examination of the General Counsel's witness. The failure to present any witnesses or raise any credibility issues demonstrates the baseless and frivolous nature of Respondent's defenses. The mere cross-examination of the General Counsel's witness is insufficient to establish any legal basis for its defenses, whatever they may be. *Care Manor of Farmington*, supra. Indeed, large portions of the General Counsel's case remain wholly unrebutted. There are numerous allegations not even arguably covered by Respondent's notes and upon which no contrary testimony was offered. These include John Murphy's threat not to sign a contract, Respondent's refusals to provide information, and Respondent's refusal to engage in lengthier and more frequent bargaining sessions. Moreover, Respondent produced no evidence of its own to contradict the General Counsel's evidence of its disruptive and dilatory tactics at the bargaining table. Respondent's notes, sketchy and conclusionary as they are, serve not to rebut those of Busch, particularly without any testimony concerning them. By failing to proffer any evidence, Respondent essentially admitted that it violated the Act, yet still forced the General Counsel and the Charging Party to litigate the matter nonetheless.

In the presentation of such a frivolous defense, Respondent made the Board into an instrument of its own unlawful conduct. The lengthy attenuated trial of these matters occurred largely due to Respondent's insistence upon, and tactics during, the trial of this matter. By its attendance at trial, Respondent deliberately limited its availability to negotiate with Busch. In so doing, the Board became its unwitting agent in prolonging the negotiations. Had I not terminated the abusive, time consuming cross-examination of Knipper, it might still be continuing, further perpetuating Respondent's refusal to bargain and delaying any possible remedy. In these circumstances, any effect of the Board's remedy may have will be wholly dissipated by the passage of time through the use of the Board's proceedings. Busch, and more particularly Respondent's members, are ill served by this conduct.

Respondent raised issues at trial where none existed. In its answer, Respondent denied that Secretary-Treasurer John Murphy was an agent of Respondent and that Respondent's president, James Hoar, was both an officer and agent of Respondent. Similarly, Attorney Domesick, in his opening statement, contended falsely and without justification that no exclusive hiring hall arrangement existed between Respondent and Busch. While these matters were easily proven, it was an unnecessary exercise.

The frivolous nature of Respondent's conduct of the litigation was only further aggravated by Respondent's conduct at the hearing. Respondent conducted the trial as a microcosm of the negotiations, containing virtually all of the elements of detailed bargaining. Respondent treated it as a game. During the hearing, Respondent demonstrated a total disdain for the Board and its processes, both by the conduct of its attorney and by its chief officer, John Murphy.

Domesick engaged in a lengthy, deliberate exhaustive cross-examination of Pat Knipper that was demonstrative of detailed bargaining. This 10-day cross-examination served primarily to consume time and delay the process, similar to his conduct of the negotiations. The cross-examination served only to confirm the accuracy of Busch's bargaining notes. It had no other apparent purpose, other than to abuse Knipper and the process. This latter objective was conclusively demonstrated when, after the cross-examination was terminated, Respondent chose to put on no witnesses in its own defense. Had Respondent been mounting any sort of defense through its cross-examination of Knipper, it would have continued it to completion through another witness. By not raising a defense, Respondent continued to demonstrate its disdain for the Board and its processes.

That disdain was most palpably shown by the behavior of John Murphy. Though lawfully subpoenaed to testify, Murphy failed to appear at the start of the hearing on October 1, 1996, at the beginning of the surface bargaining portion of the case. Attorney Domesick represented Murphy who did not intend to appear.[83] Domesick incredibly claimed to have no knowledge of Murphy's whereabouts or control over his attendance. After considerable discussion and effort, little of it by Domesick, Murphy was located by me standing outside a coffee shop near the Federal Building.He agreed to appear at a specified time that afternoon. Typically, Murphy did not appear at the appointed time and Domesick claimed no knowledge of his location. I then threatened to bar his testimony. Miraculously, Domesick immediately located Murphy "in the men's room." This charade typified the total disdain demonstrated by Respondent for the Board and its processes.

When he did testify, Murphy's hostility to the proceedings and the Board was palpable. Though present in the hearing room, Murphy denied being subpoenaed to testify when asked by his attorney. Even after being shown return receipts by the General Counsel which he admitted were signed by an employee of Respondent, Murphy claimed not to have seen the subpoena. Once present to testify, and having admitted to discussing the subpoena with his attorney, there was no purpose to his dissembling on this point other than to demonstrate his contempt for the proceeding.

Similarly, when required to appear to testify at the conclusion of the trial on March 3, 1997, after the existence of the second set of Respondent's notes was discovered, Murphy once again arrived late. On these occasions, the time of all parties was wasted because of Respondent's disdain for the process.

This disdain carried through to subpoenaed records. When subpoenaed in September 1996 to produce all of its bargaining notes made by "officers of Respondent and/or its attorneys and negotiating committee members" concerning the Busch negotiations, Respondent knowingly produced only Attorney Dome-

[83] Murphy also refused to appear *at all* when subpoenaed by the General Counsel to testify in the Pour House portion of the case in June 1996. He appeared to testify only as part of Respondent's defense.

sick's notes, falsely representing them to be its only notes. Upon attempting to introduce those notes at trial in February 1997, John Murphy admitted that, indeed, he, too, had taken a comprehensive set of notes during negotiations. Respondent resisted producing those notes, resulting in an extensive discussion at trial and yet another adjournment in the hearing until they could be produced and testimony received concerning them.

This conduct is directly attributable to Attorney Domesick. As both attorney and chief negotiator for Respondent, he was well aware of the existence of two sets of notes. Moreover, in questioning Murphy on October 1, 1996, at trial, Domesick admitted he had received a subpoena for Respondent's bargaining notes, and he had discussed that subpoena with Murphy. Murphy, incredibly, denied receiving the subpoena served on him, though admitting the receipt was signed by an employee of Respondent. This exchange clearly demonstrates that Respondent knowingly determined that only one set of notes be produced pursuant to subpoena, apparently selecting the one it felt was most favorable. This type of game playing typifies Respondent's behavior at the bargaining table and demonstrates its total disdain for the Board's processes.

The facts in this case are remarkably similar to those in *Care Center of Farmington, Inc.,* supra, where Respondent also presented no witnesses to bad-faith bargaining allegations. Rather, Respondent merely cross-examined General Counsel's witnesses. While a respondent does have the right to avail itself of the Board's processes, as the administrative law judge found, it may not do so in an abusive manner "free of charge." Id. at 335. Litigation expenses must be assessed against parties which abuse the Board's processes in this manner.

Respondent's reasons for extending and delaying the Board's processes remain unclear; the fact that it did so does not. Respondent's insistence on litigating this case, despite all entreaties of settlement, caused the Board's resources and processes to be unnecessarily burdened. It caused the unnecessary expenditure of time and money by the Board and by the Charging Party. In these circumstances, it is only just and proper to award litigation expenses to the Board and the Charging Party as the only method to remedy this sort of egregious behavior. *Care Manor of Farmington, Inc.,* supra.

As noted earlier, this case had three parts, the Pour House portion, the Woody's portion and the surface bargaining allegations. Clearly, the first two portions are ones in which Respondent presented a debatable defense. As noted above however, this cannot be said about its "defense" to the surface bargaining allegations. In *Frontier Hotel,* the Board addressed the question of the appropriateness of awarding litigation expenses when there are some complaint allegations to which a nonfrivolous defense is offered, yet the bulk of the case involves matters to which only a frivolous defense was offered. It stated, supra at 861:

> We find that the presence of these additional allegations is insufficient to defeat the Charging Parties and General Counsel's motions for reimbursement of litigation expenses. While we do not pass on the particular merits of any case previously decided by the Board, we disagree with the blanket notion that the assertion of a debatable defense concerning *any* complaint allegation, or even the dismissal of an allegation, necessarily elevates the respondent's defense to the level that it may appropriately be characterized as debatable. Indeed, in any consolidated proceeding such as this, there will be a variety of alleged violations, and some may be withdrawn or found lacking in merit. Limiting the award of litigation costs to only cases undiluted by other issues, however, would strongly encourage separate litigation of alleged unfair labor practices, which clearly would not be an efficient use of the Board's resources. Moreover, in the circumstances of this case, the Respondent's surface bargaining significantly overshadows the other allegations and dominated the litigation of the complaint. Therefore, we find that an award of full litigation costs to the Charging Parties and the General Counsel is appropriate.

In the instant case, the surface bargaining issue overshadowed the other elements, especially as to the cost of litigation. The Pour House and Woody's portions took less than 1 week each. The surface bargaining portion took all or part of 8 weeks. Moreover, the award of litigation expenses can be tailored to fit the offense. I will award litigation expenses as requested by the General Counsel for those expenses that can be demonstrated to relate solely to the surface bargaining portion of this case. As each portion of the case was tried in a relatively separate fashion, this should be easily accomplished. The surface bargaining segment of the consolidated cases could have been tried separately from the other segments as the proof adduced with respect to the surface bargaining was entirely different from that adduced with respect to the Pour House and Woody's segments. Respondent should not be allowed to benefit from its reprehensible actions simply because the cases became consolidated. Indeed, the Board attempted to negotiate a settlement of the surface bargaining portion of the case, sending a settlement judge to meet with the parties in September 1996. At this point, simply by agreeing to bargain in good faith and establishing a realistic bargaining schedule, that matter could have been put to rest. Instead, Respondent chose to continue to delay and frustrate the bargaining process and abuse the Board's processes, and should bear the burden of the cost of such abuse.[84]

I cannot agree with the General Counsel's request that negotiating expenses should be awarded. Addressing this issue in *Frontier Hotel,* supra at 859, the Board held:

> As an initial matter, we emphasize that we do not intend to disturb the Board's long-established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations. In most circumstances, such orders, accompanied by the usual cease and desist order and the posting of a notice, will suffice to induce a re-

[84] The litigation costs should include costs and expenses incurred by Charging Party and General Counsel in the investigation, preparation, presentation, and conduct of the surface bargaining portion of this proceeding, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses as determined at the compliance stage of this case.

> spondent to fulfill its statutory obligations. In case of unusually aggravated misconduct, however, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their 'effects cannot be eliminated by the application of traditional remedies,'"[85] an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.

Here, though it needlessly spent a great deal of its resources in the one-sided bargaining process, Busch still has the economic strength to return to the bargaining process. On the other hand, if the Respondent is ordered to pay the negotiating expenses, it will, in my opinion, put the Union in such an unfavorable financial position that it will not have the economic strength to return to the bargaining table and adequately negotiate. Its members deserve this opportunity.

CONCLUSIONS OF LAW

1. August A. Busch & Co. of Massachusetts, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent was legally responsible for the conduct of its members and supporters at the Pour House demonstration on December 8, 1995, and thus has engaged in conduct in violation of Section 8(b)(4)(i) and (ii)(B) of the Act, by:

(a) At the Pour House demonstration, appealing to prospective customers not to patronize the Pour House and radio station WZLX, neutral persons in its dispute with Busch.

(b) By its actions inside the Pour House during the demonstration, including shouting slogans, destroying prizes, intimidating customers and other acts, which acts constituted unlawful restraint and coercion of neutral persons.

(c) By the acts of its members in physically bumping and otherwise threatening supervisors and employees of Busch during the Pour House demonstration.[86]

(d) By the acts of its members and supporters at the May 3 and 10, 1996 demonstration at Woody's Liquors in appealing to prospective customers not to patronize Woody's Liquors, interfering with access of prospective customers to Woody's Liquors and its parking spaces, and intimidating customers of Woody's Liquors by opening their shopping bags without consent and entering their vehicles without consent.

(e) By the acts of its members and supporters at the May 3 and May 10, 1996 demonstration at Woody's Liquors in harassing, intimidating and appealing to employees of Woody's Liquors in an unlawful attempt to induce them to withhold their services from Woody's Liquors, a neutral person in Respondent's dispute with Busch.

4. On May 10, 1996, Woody's Liquors was not a primary employer in dispute with the Respondent, but rather was a neutral person in Respondent's dispute with Busch.

5. Respondent has engaged in conduct in violation of Section 8(b)(3) of the Act, by:

(a) Failing and refusing to provide Busch with relevant and necessary information concerning Respondent's operation of an exclusive hiring hall.

(b) Failing and refusing to provide Busch with relevant and necessary information concerning Respondent's Health and Welfare Plan.

(c). Failing and refusing to meet with Busch at reasonable times and for reasonable periods of time for the purposes of collective bargaining.

(d). Failing and refusing to bargain in good faith with Busch by, inter alia, engaging in surface bargaining, engaging in dilatory, disruptive and intransigent conduct at the bargaining table, making burdensome information requests of Busch and informing Busch that it would never get a collective-bargaining agreement from Respondent.

5. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in a series of acts and conduct violative of Section 8(b)(3), (1)(a), and (4)(i) and (ii)(B) of the Act, I recommend that it be ordered to cease and desist therefrom and that it take such affirmative action as will effectuate the policies and purposes of the Act. As to the 8(b)(4) violations, a broad cease and desist order must issue enjoining Respondent from engaging in future secondary activity proscribed by Section 8(b)(4). Such a broad order is warranted as Respondent has shown a proclivity for violating the Act over the more than 2 years of its boycott campaign against Busch. *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715 fn. 4 (1993); *Iron Workers Local 378 (N. E. Carlson Construction),* 302 NLRB 200 (1991).

During the course of its consumer boycott campaign against Busch, Respondent on three occasions engaged in conduct which warranted issuance of an injunction by a Federal court under Section 10(l). Two of those incidents are part of the allegations in this matter; the third, involving the "group shopping" allegations, was settled after 4 days of trial. A complaint alleging similar conduct was issued, and subsequently settled, as part of the earlier consumer boycott campaign against Burke Distributing. This repeated conduct demonstrates the proclivity to violate the Act by Respondent necessary for a broad order. Respondent has shown that it will engage in a variety of conduct as part of its boycott campaign which crosses the line of unlawful conduct under Section 8(b)(4). Without a broad remedial order, Respondent is likely to engage in similar unlawful secondary activity in the future.

Having found that Respondent violated Section 8(b)(3) of the Act by failing and refusing to provide the Employer with relevant and material information requested concerning Respondent's hiring hall and its health and welfare fund, Respondent should be ordered to immediately furnish the Employer with each of the items requested in the two information requests.

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[85] Citing *Gissel Packing Co*., 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.,* 386 F.2d 562, 570 (4th Cir. 1967).

[86] This activity also violates Sec. 8(b)(1)(A) of the Act.

Having found that Respondent has violated Section 8(b)(3) of the Act by failing and refusing to bargain in good faith with the Employer, it should be ordered to bargain, if Busch should so request, and if a collective-bargaining agreement is reached, reduce that agreement to writing.

Respondent should be ordered to pay to the Charging Party and General Counsel the litigation costs incurred by them with respect to the trial of the 8(b)(3) violations found here. The litigation costs should include costs and expenses incurred by Charging Party and General Counsel in the investigation, preparation, presentation and conduct of the 8(b)(3) portion of this proceeding, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses as determined at the compliance stage of this case.

Respondent should be ordered to post the notice to members on all bulletin boards at its offices and union hall and on any it bulletin boards it may maintain at Busch's facility. Respondent should further be ordered to mail the notice to members to all employees employed by Busch since the commencement of negotiations on October 13, 1994, in each of the two bargaining units. This conduct is required so that employees will be fully apprised of Respondent's extensive violations in negotiations over a substantial period of time. There is no evidence whatsoever that Respondent's members were aware of or condoned Respondent's bad faith bargaining. Respondent's masquerade at the bargaining table cost its members dearly in the lack of a collective-bargaining agreement with all of its inherent benefits, not the least of which were arbitration and an improved economic package. Particularly due to the passage of time since the violations commenced, due in part to the protracted nature of the proceedings for which Respondent shoulders much of the blame, the Notices must be mailed to employees so they may be apprised of the unlawful nature of Respondent's conduct and assured it will not recur. *Eastern Maine Medical Center,* supra at 228. The traditional requirement of posting the Notice in the Respondent's hall and offices is inadequate since it is not likely that members visit the hall on a regular basis. Thus, employees would not be informed of the Board's actions, particularly where it is not known whether Respondent maintains any bulletin boards at Busch's facility. Moreover, since spare employees work only irregularly and may also not appear regularly at Respondent's hall and offices, it is imperative that the notices be mailed to them so that they are apprised of the nature and remedy for Respondent's unlawful conduct.

Respondent should further be ordered to sign and return to the officer in charge of Busch sufficient copies of the notice to members for posting by Busch, if willing, at all places where notices to employees are customarily posted. *Operating Engineers (Stone & Webster)*, 283 NLRB 734 (1987).

[Recommended Order omitted from publication.]